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IN THE

Supreme Court of the United States

October Term, 1964

No. 355

BERNARD SUSSER, *et al.*,
Petitioners,

—against—

CARVEL CORPORATION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CARVEL RESPONDENTS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CARVEL RESPONDENTS

Opinions in the Courts Below

Two opinions were delivered in the United States Court of Appeals for the Second Circuit which affirmed the judgments of the district court. They are reported at 332 F. 2d 505 and included in the record on this appeal, R. *431.*[1] Report of the opinion by the United States District Court for the Southern District of New York is at 206 F. Supp. 636. It is reprinted here, R. *43.* As set out in the official report, the opinion of the Court of Appeals, (*per* Friendly, Circuit Judge, with whom Medina, Circuit Judge, joins), 332 F. 2d 505, 518, R. *449,* appears after the opinion by Lumbard, Chief Judge (writing for the majority in part and dissenting in part), 332 F. 2d 505, 508, R. *431.*

[1] Italicized record references refer to the opinions below; throughout this brief all emphasis is ours unless otherwise noted.

Questions Presented

Introductory: the Terms and Circumstances of the Case

Thomas Carvel founded, and with his wife,[2] came to own the business of the several related and affiliated respondent Carvel corporations (collectively referred to herein as "Carvel"). Carvel is in the business of arranging for the manufacture and sale of Carvel ice cream products, made from Carvel special formula ingredients, through franchised outlets. Each franchisee agrees that he will devote his best efforts to operate his Carvel franchise. Carvel, in turn, gives the franchisee a specified geographic territory in which he is granted the exclusive right to manufacture and sell Carvel ice cream products, under the Carvel trademarks. The franchisee must make his Carvel ice cream products from special formula Carvel ingredients. Carvel also makes available to the franchised dealers equipment and auxiliary products such as paper goods, which the dealer may need in his business and which he may buy from Carvel, or from any other source selling equivalent merchandise. Carvel has no customers other than its franchised dealers.

Carvel abandoned a pre-1955 franchise agreement and entered into a new form of franchise agreement with petitioners, obligating them to buy from Carvel or from ap-

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[2] Appellants consented to the dismissal of appeals from the judgments of the district court dismissing in their entirety the claims against Thomas Carvel, his wife, Agnes Carvel, and other individuals identified with the Carvel business (R. 429).

"The actions as against these individuals . . . were dismissed by the Court on motion at the end of the case on the ground that no basis for any individual liability had been shown by the plaintiffs' evidence" (R. 46, fn. 3).

proved sources designated by Carvel, their entire requirements of only those supplies which are a part of the ice cream end products sold to the public under Carvel trademarks and tradenames. The new agreement permits the dealer to purchase machinery, equipment, and paper goods from independent sources as long as his store is maintained in accordance with Manual specifications (R. *434*), and to sell Carvel products "at any price that the dealer determines" (R. *435*).[3]

The Questions Presented

1. Whether the record shows clear error on the part of both courts below which found and decided that: (a) the Carvel agreements were motivated by lawful purpose and not for predatory, monopolistic or other illicit purposes, (b) there was insufficient proof that Carvel's system of business was an unreasonable restraint of trade or that it accomplished or tended to bring about substantial foreclosure of or injury to competition, (c) there was insufficient proof that Carvel possessed sufficient economic power over a tying product to induce or compel its dealers to purchase tied products, (d) there was insufficient proof with respect to items, claimed to be tied products, that Carvel appreciably restrained free competition therein, affecting a not insubstantial amount of interstate commerce, and (e) the proof was sufficient to show legal and economic justification for the inclusion and enforcement of the restrictive contractual provisions of which petitioners complain.

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[3] The pre-1955 franchise agreement under which Carvel had the right to require the dealers to adhere to its prices is not involved on this appeal since the only plaintiffs in the trial below who entered into the pre-1955 franchise (i.e. the *Sussers*, the *McCoys*, the *Fredericks*, and *Mueller*) do not have appeals pending as to the Carvel defendants, see fn. 4, *infra*.

2. Whether the record shows clear error by the courts below which found and decided that Carvel did not engage in an unlawful price-fixing[4] scheme.

3. Whether the record shows clear error by the courts below which found and decided that the supply contracts between Carvel and the other respondents herein did not violate the antitrust laws.

Statement of the Case

Preliminary Statement

Petitioners have misinterpreted the factual basis of the decisions of the courts below. Their treatment of the facts is in many respects distorted, inaccurate and incomplete. Virtually ignoring the findings below, they seem to assume that grant of certiorari automatically entitles them to evaluation and findings of fact by this Court, de novo. Accordingly, it becomes necessary for us to present a counter-statement of the facts in some detail to show the genuine

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[4] The finding by the district court that Carvel's pre-1955 franchise agreement contained an illegal price-fixing provision applied only to four of the twelve franchise dealers who were plaintiffs below, namely, Susser, McCoy, Frederick and Mueller (R. *66*); the district court did not enter final judgment as to any claim for relief against the Carvel respondents by these four dealers (R. *71*, 72-102) who are petitioners here, on appeal from judgments affirming dismissal by the district court of their respective claims against the non-Carvel corporate defendants (R. *71*, *72-73*, *77-79*, 89-90). Chief Judge Lumbard was mistaken in stating in his separate opinion that Carvel failed to appeal from a judgment based on the illegal price-fixing provisions of the pre-1955 franchise agreement (R. *435*), and that the district court directed "entry of judgments in all the actions" (R. *435*, fn. *2*), because there was no direction for the entry of judgments against the Carvel respondents in the cases brought by Susser, McCoy, Frederick and Mueller (R. *71*), and no such judgments were in fact entered (R. 72-102). Consequently, there was nothing from which Carvel respondents could appeal, and therefore the pre-1955 franchise agreement is not in issue on this appeal insofar as Carvel is concerned.

state of the record and the foundation for the findings, reasoning and decisions of the lower courts.

The proof of record consists of documents, stipulations and oral testimony which petitioners did not discredit, contradict or refute. While the evidence may in retrospect seem meagre on some aspects of the case, the district and appellate courts found it sufficient to justify dismissal of the complaints. Manifestly, the quantum of respondents' evidence was influenced by petitioners' voluntary stipulation to limit their evidence "to written agreements and other documents" and thereby establish *per se* violations of the antitrust laws (R. 5). Whatever view is taken of the effect of petitioners' stipulation to stand or fall on proving *per se* violations, no restriction was imposed on the offer and admission of their evidence which in the aggregate was found insufficient by the courts below to show any antitrust illegality, *per se* or otherwise. Nor is it open to fair challenge that Carvel and the other respondents were entitled to shape their defense in reliance on petitioners' self-limitation to prove *per se* offenses.

Perhaps petitioners' glaring departure from the realities of the record and findings of fact is best exemplified by their hyperbolic insistence that "the Carvel system is revealed as a vast interrelated scheme whose only purpose and effect is to restrain competition" (Their Brief, p. 19), "the dealer is no more than an economic serf," . . . "the Carvel octopus . . . strangled free enterprise with a frightening finality," having "no parallel in any recorded case" (*id.* 63), and "The decisions of the lower courts, have, in effect, emasculated and repealed the antitrust laws with respect to the owner of a trademark" (*id.* 68). This rhetorical

indictment typically ignores dismissal on the merits, after a protracted trial of petitioners' allegations of fraud (R. *46, 433, 455*)[5] and unanimous exoneration, after trial of the antitrust claims, from charges of predatory purpose (R. *62, 448, 452*). Petitioners without support in the record contradict the findings on the record by the district court that (R. *49*): "*The franchise system creates a class of independent businessmen;* it provides . . . a uniform product at numerous points of sale from small independent contractors, rather than from employees of a vast chain. *The franchise system of operation is therefore good for the economy*"; and concurrence by the Court of Appeals (R. *452*), that the growing repute of the Carvel trademark "*. . . was intended to help the little band of Carvel dealers swim a bit faster than their numerous rivals up the highly competitive stream.*"

Petitioners' Grievances

So far as concerns Carvel, this appeal relates only to eight petitioners, all of whom entered into the post-1955 franchise agreement (R. *54, 66*, fn. 6), involving four franchise stores in Pennsylvania and four in Connecticut.[5] The Pazdro complaint, which was the last to be filed (May 20, 1960), is submitted as typical (R. 137). It alleges that Carvel was engaged in the business of selling and distributing freezers and allied equipment and supplies to retailers who sold ice cream under the name of Carvel or Dari-Freeze, or both (¶ 10, R. 139). It is also alleged that Carvel, in order to secure a monopoly in the products which they

[5] Pennsylvania: Pazdro, Giberman, Pierce and Rodens; Connecticut: Modick, Ossola, Seu and Phelan (R. *54*, fn. 6).

manufacture: ". . . entered into . . . contracts and leases with plaintiffs . . . and sold to them merchandise, supplies and equipment, *on the express condition that the plaintiffs and others refrain from dealing in competitive products*" (¶ 58, R. 147). The complaint of the other petitioners of which this one is typical, contains substantially the same allegations (R. 3-10). All of them predicate their claim on the alleged unlawful nature and effect of total requirement and exclusive dealing agreements.

There is no claim by Paźdro or the others of an unlawful tying requirement. There is no charge that the sale of equipment, patented or unpatented, was conditioned upon the purchase or lease of other goods. Absent also, is any specific allegation that the licensed use of trademarks as such is conditioned upon compulsory purchase of other (tied) products. It is crystal clear that the gravamen of the complaint for violation of the antitrust law, in each petitioner's case, is predicated on price fixing, an alleged conspiracy to restrain trade and alleged unreasonableness of the total requirement and exclusive dealing features of the Carvel agreements with dealers. That the grievance of coercive tying provisions is not featured in petitioners' complaints, is most unusual. If the Carvel dealers had actually been made to feel that they were denied the ability to purchase a piece of equipment which they regarded as desirable, or to obtain use of desirable trademarks, unless they also agreed to buy articles which were less desirable, it is strange, indeed, that the complaints say nothing about the matter.

Petitioners submitted to the district court, through counsel who represented all of them, a voluminous particulariza-

tion of their antitrust claims entirely consistent with the *absence* of reliance on unlawful tying agreements.[6] In *singular* contrast to their strenuous advocacy here of every species of presumptive unlawfulness, we invite attention to the following which appears in the particularization of their claims as represented to the district court: As to Carvel's *patented* freezing equipment, they say:

> "The plaintiffs will establish, through the testimony of non-interested witnesses and former Carvel employees that Carvel does not own the patents on the freezing equipment but claimed to own them as an added inducement to effect the sale of the franchise." (Submission, p. 41)

> "It will also be established, through disinterested witnesses as well as former Carvel employees, that the freezer to which Carvel claims a patent was secured from the Morris Manufacturing Company *and that similar and better machines are available, at lower prices, on the open market.* The fact that Carvel does not own the patent on the freezer will be established beyond peradventure of doubt." (*id.*, p. 42)

Denigration of Carvel *trademarks* was couched in terms of their *non-existence*:

> "It is submitted that the claimed patents, trademarks and copyrights exist only in the mind of Thomas Carvel and are as real as his imagination. We concede, however, that Thomas Carvel, but none of the Carvel Corporate defendants, owns such 'valu-

[6] The submission made pursuant to a pre-trial order of January 10, 1961, devotes its first one hundred pages to a particularization of the fraud count and the antitrust counts in the complaints.

> able' trade-marks as 'Lollapalooza' under registered trademark dated September 10, 1957. . . ." (*id.*, p. 44)

Nor does it deserve to be overlooked that petitioners objected to the introduction in evidence in the antitrust trial of the Carvel trademarks (R. 153, 155). Additionally, counsel's submission confirms that petitioners were assuming the burden of proving illegal price maintenance and "conspiracy to boycott and foreclosure of competition" *without mentioning tying arrangements;* they said:

> "It will be conclusively established at the trial of this action, through the unimpeachable testimony of former employees of Carvel, that the Carvel organization entered into agreements and understandings with suppliers of merchandise *to give and grant kickbacks to the Carvel organization* and in addition thereto to sell merchanise to Carvel at fixed prices and to refrain from selling such merchandise to Carvel operators. *The purpose, design and intent being to foreclose competition based upon the franchise agreement between Carvel and its operators and to permit and allow Carvel to profit from its agreements with suppliers of merchandise*" (*supra*, pp. 84-85).

Only after the antitrust trial did petitioners for the first time argue that under the pre-1955 franchise agreement Carvel used the freezer and front assembly plate as the tying element to induce purchase of tie-in supplies, and claimed (notwithstanding specific provisions to the contrary), that the same practice was followed under the post-1955 franchise agreement (Plaintiffs' post-trial brief, pp. 17-20). The district court found these contentions without merit (R. *56-59*). The Court of Appeals sustained these

findings (R. *449-456*). Petitioners' briefs in both courts below did not so much as refer to the trademarks as an element in the alleged tying arrangement. This appeared for the first time in their petition to this Court for a writ of certiorari. Petitioners' claim of error by the courts below in failing to find the pre-requisite facts for unlawful tying agreements will be dealt with under a separate point in this brief (*infra,* Point I). Preliminarily here, it is not without significance that none of the complaints filed at different times between September 1959 and May 1960 (R. 3, 4) stated a claim based on illegal tying requirements, and that such charge generally, but more particularly with reference to the trademark as a "tying product", was an after-thought, *without* factual basis in the business relationship of the parties. These facts and circumstances seem especially meaningful in the context of far flung fraud charges, brought by a group of widely scattered dealers, represented in common by the same lawyer. Ultimately, after severance and separate trials, petitioners' claims that Carvel's franchise system was built on systematic fraudulent practices, were dismissed. This does not alter the obvious fact that the extravagant fraud claims were originally designed as a magnifying frame to build up the treble damage cases. These, in turn, which were not factually predicated on "proscribed" tying requirements, were recognized for their "triviality" and "negligible" character by the Court of Appeals which affirmed their dismissal (R. *455*).

Industry Background

The Carvel enterprise is part of the ice cream industry engaged in the sale of ice cream products. The district court noted that the method of distribution by means of

numerous franchised outlets "has had a phenomenal growth in the ice cream industry," that it enables many with small capital to become . . . "small independent contractors, rather than . . . employees of a vast chain" (R. *49*). Consumer acceptance of the variety of ice cream products distributed by numerous franchising organizations adopting a uniform style of doing business through "literally thousands of individual stores all over the country" is a post-war development, beginning about 1948.[7] The principal ingredient is ice cream *mix* which is as "old as the dairy business itself." The end product made from the ice cream mix is available to the public at a multitude of sources, from the corner drugstore to roadside stands and mobile units (R. *451*).[8]

Thomas Carvel, the founder of the Carvel business, entered the ice cream field in 1948 with a background of

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[7] This growth of the franchise system was pointed out in a decision not directly germane here, Ar-Tik Systems, Inc. v. Dairy Queen, Inc., 302 F. 2d 496 (3d Cir. 1962), where the Court said:

> "The suit is an incident in the phenomenal development of the merchandising of this frozen dessert or soft ice cream product to the public by literally thousands of individual stores all over the country under practically uniform methods within a period of less than 23 years" (*id.* at 500).

In a connected case, Ar-Tik Systems v. McCullough, 133 F. Supp. 807, 808 (S.D. Ill. 1955), it was noted that the general plan measuring compensation to the franchising organization by the gallonage of mix processed through a dispensing freezer had become "commonplace".

[8] In Engbrecht v. Dairy Queen Co., 203 F. Supp. 714, 720 (D. Kans. 1962), which in another connection will be subsequently discussed herein, the Court observed:

> "Here we are dealing with a commodity old as the dairy business itself—a soft-mix ice cream—available in almost every restaurant, inn, eating place, drug store and crossroad. It may be had in any degree of viscosity, in any flavor—vanilla, chocolate, strawberry, orange, lemon and lime. It may be commercially processed or privately prepared and frozen."

experience since 1934 with frozen custard products (R. *47-48*). He developed and patented a one piece barrel and dispenser tip for a freezer and obtained design patents and a number of trademarks serving to identify and promote recognition and sale of the ice cream products sold under the Carvel name (R. *442*, fn. 6-a). The related Carvel companies were authorized by the owner to use, and license others to use, the patented items and trademarks for the exclusive purpose of franchising dealers to make and sell the Carvel ice cream products. The number of Carvel stores grew rapidly from 180 in 1954 to 400 at the time of trial in 1962 and the Carvel gross volume of sales to these stores reached a high point of five and one-half million dollars in 1957 and aggregated under four and one-half million dollars in 1960. The annual gross volume of the franchised dealers themselves ranged from six to eight million dollars (R. *434*), by stipulated estimation (R. 29). The area of greatest concentration of the Carvel business was concededly in the five states of Massachusetts, Connecticut, New York, New Jersey and Pennsylvania, with a very few Carvel dealers located in four other states (R. 30, *451*).[9]

Carvel was, and is, in direct competition with numerous franchising organizations sponsoring competitive ice cream products such as "Dairy Queen, Tastee Freez, Dari Delite, King Kone, Dari Isle, and others, with chains and independents utilizing mobile units, with chain stores and operations such as Howard Johnson, and with the ubiquitous corner drugstore" (R. *451*, 122). The courts below found that Carvel was not in competition with the suppliers of

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[9] Facts bearing on Carvel's share of the market are discussed in the body of our argument, *infra*, Point IVA.

dairy and other products from whom it purchases Carvel supplies (R. *449, 442, 53*). It was found that at the supplier level, there was "vigorous" competition to secure business from Carvel (R. *443, 451, 452*).

The Carvel Franchise Agreements

The pre-1955 franchise agreement differed from the post-1955 franchise agreement in two major respects. First, the pre-1955 agreement provided that the franchisee would have to charge retail prices determined by Carvel (Pl. Ex. 2, R. 221, 227, 3150). Second, it required the franchisee to purchase all equipment from Carvel (*id.* 224). These provisions were abandoned in 1955. The rights of franchisees under the pre-1955 agreement were brought into conformity with the rights of those franchisees who entered into the post-1955 franchise by the letter of February 27, 1956 (Defs. Ex. C1-B, R. 283, 3514). By this means, Carvel made it clear that henceforth each franchisee was to have the right to set his own prices for Carvel products and any past references "to the retail prices . . . are deemed to be references to *recommended* prices only" and "you are entirely at liberty to vary these prices if you so desire, and we disclaim any intention to control your retail prices." It was made equally clear that equipment and those supplies not sold as part of the end product, as long as they are up to specifications, may be purchased anywhere, while "the mix (made according to our own Special Formula) as well as . . . all items which are sold as parts of the end product that is offered as Carvel's Frozen Dairy Product, in its various forms, to the retail purchaser who consumes it . . ." must be bought from Carvel ". . . because the public comes to your store to buy a 'CARVEL' product—

and it is a 'CARVEL' quality product that you sell in that fashion" (Def. Ex. C-1B, R. 283-284, 3514).[10]

The basic contract document on this appeal is the post-1955 "Dealer's Franchise Agreement" (Pl. Ex. 1, R. 208, 3148), which establishes the franchisee as the exclusive retail manufacturer and vendor of Carvel ice cream products in a specified area (Pl. Ex. 1, R. 208, 210, Par. "FIRST"; 213, Par. "TWELFTH", 3148). The franchise agreement is also a total requirements contract whereby Carvel agrees to sell to the franchisee and the franchisee agrees to purchase from Carvel or a Carvel approved supplier his entire requirements only of those Carvel supplies which are needed to make the Carvel ice cream products sold to the public (Pl. Ex. 1, R. 208, 211, Par. "SIXTH", 3148). Depending on his customers' preference, the dealer has a choice among 70 items of supply which go into the processing of the end product which he is required to buy from Carvel; here remain on Carvel's product sheet more than 400 other items which the dealer may buy wherever he chooses, if they are of equal specifications (Pl. Ex. 8-A, § H, supply lists No. 1 through 10, 3165).[11]

The franchisee is given the right to identify the final ice cream products made and sold by him as "Carvel" ice cream products, which in fact they are (Pl. Ex. 1, R. 208, 212, Par. "SEVENTH", 3148). The franchise agreement further provides that in return for Carvel instructing and training the franchisee with respect to Carvel's manufacturing and merchandising methods and techniques and for

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[10] Emphasis in the original.

[11] This exhibit is among those designated and brought to the Court pursuant to Rule 38; see R. 5 fn.

the use of the name "Carvel" the franchisee shall pay as compensation to Carvel 25¢ per liquid gallon of mix used (Pl. Ex. 1, R. 208, 212, Par. "SEVENTH", 3148). Thus the compensation that Carvel receives is dependent upon the success of each franchisee since Carvel's compensation rises as the franchisee prospers and in fact is a direct function of the business done by each franchisee.

The franchisee is clearly and unequivocally given the right under the franchise agreement to charge any price he wants for the Carvel products he makes and vends and it is further explicitly made clear that any price emanating from Carvel is merely a "recommended" price which the franchisee is completely free to disregard (Pl. Ex. 1, R. 208, 212, Par. "EIGHTH", 3148; R. *435, 436*). The franchisee is also specifically and unequivocally given the right to purchase all items other than "end product" ingredients (e.g. equipment, paper goods, etc.) from any source he desires, provided Carvel specifications are met (R. *434*). In the event the franchisee wishes to purchase paper goods from a source other than Carvel, Carvel agrees to permit manufacturers of such products to print the Carvel name on such goods (Pl. Ex. 1, R. 208, 212-213, Par. "NINTH", 3148).

Finally, under the franchise agreement each franchisee agrees that he "will devote his best efforts and his entire time" to the operation of his Carvel franchise (Pl. Ex. 1, R. 208, 213, Par. "ELEVENTH", 3148) and that he will sell only Carvel ice cream products made in accordance with the S.O.P. from his Carvel store (Pl. Ex. 1, R. 208, 211, Par. "FOURTH", 3148). The relevant provisions of the post-1955 franchise agreement are as follows:

> "FOURTH: During the term of this agreement, the Dealer agrees to sell at the Carvel Store, Carvel's

Frozen Dairy Product solely in accordance with the Manual and will sell no other product except as hereinafter expressly otherwise provided . . . "

"FIFTH: The parties recognize the necessity for operation in accordance with the standards set forth in the Manual and agree that Carvel inspectors and officers shall, for the protection of the Dealer, the public and Carvel, and its trade-marks and tradenames, make periodic inspections of the Carvel Store and of the operations . . . "

"SIXTH: In order to safeguard the integrity of Carvel's trade-marks, the Dealer agrees that he will purchase from Carvel or from approved sources designated by Carvel, his entire requirements of Carvel's Frozen Dairy Product mix, toppings, flavorings and other ingredients, *cones and any other items sold as a part of the end product that is offered for consumption to the retail purchaser* as scheduled in the Standard Operating Procedure Manual . . . The Dealer agrees to rely solely on Carvel's determination of price, from time to time . . . *Carvel agrees to sell to the Dealer the Dealer's requirements of supplies set forth in this paragraph,* unless prevented therefrom by act of God, governmental restrictions, labor difficulties, inability to obtain supplies, or similar contingency."

"SEVENTH: Carvel shall instruct the Dealer in the production of Carvel's Frozen Dairy Product, in its various forms, and in Carvel's merchandising methods and techniques. Carvel shall arrange for the training of the Dealer in the manner set forth in the Manual. The Dealer shall have the right to use the name 'Carvel' in connection with the sale of Carvel's Frozen Dairy Product. *As compensation for all of the foregoing,* the Dealer agrees to pay the Company *compensation of* 25¢ per liquid gallon."

* * * * * *

"EIGHTH: *The Dealer shall have the right to sell Carvel's Frozen Dairy Product and/or other items authorized for sale by him under the terms of this agreement at any price that the Dealer determines. Wherever Carvel recommends a retail price, such recommendation is based upon Carvel's experience concerning all factors that enter into a proper price, but such recommendation is in no manner binding upon the Dealer.*"

"NINTH: In connection with the operation of a Carvel Store and to comply with the specifications set forth in the Manual, the Dealer is required to purchase various items of machinery and equipment, and paper goods, a list of which is set forth in the Manual. To the extent that Carvel is able to supply the same, the Dealer shall have the right to purchase such machinery, equipment and paper goods, if he so desires, from Carvel, at prices fixed by Carvel from time to time. *The Dealer's obligation under this paragraph is satisfied so long as the Dealer equips his store and keeps it maintained in accordance with the specifications contained in the Manual. In the event that the Dealer desires to purchase his printed paper goods from sources other than Carvel, Carvel shall license manufacturers of such products to print the Carvel name thereon in connection with sales to the Dealer, with products made in accordance with Carvel standards.*"

* * * * *

"SEVENTEENTH: . . . . The Dealer recognizes that his Carvel Store is one of a large number of stores similarly built and selling to the public similar products, and hence the failure on the part of a single dealer to comply with many of the terms of this agreement could cause irreparable damage to all similar stores. . . ."

* * * * *

"TWENTIETH: This agreement is not assignable by the Dealer. . . ."

* * * * *

"TWENTY-SECOND: *Nothing herein contained shall be construed to give the Dealer any right or license in or to the use of the Carvel name or of any symbol, device or design of Carvel,* other than is specifically authorized hereunder or as may be hereafter authorized by Carvel *in writing,* and any use thereof so permitted by Carvel shall terminate on the date fixed for the expiration of the term of this agreement . . . *The Dealer acknowledges the validity of all trademarks and patents owned by Carvel, or under which it operates as licensee, and recognizes its obligation to protect such license and patents, and discontinue the use thereof upon termination of this agreement.*"

The franchisee signs other documents at the time he executes his franchise agreement which are supplemental and incidental to the franchise agreement itself. Thus the franchisee also enters into a "Signs and Special Equipment Lease" for a nominal annual rental which gives him the right to use certain promotional Carvel signs and a front plate on the dispensing freezer which puts an identifying swirl on the finished product corresponding to what appears on several registered marks (Pl. Ex. 6, R. 242, 3157). In the event the items leased under the Signs and Special Equipment Lease are required to be returned, Carvel is obligated to supply the franchisee with a new front freezer plate, without Carvel insignia, within no later than ten days after the franchisee making request therefor (Pl. Ex. 4, R. 240, 3156). The "Conditional Reassignment of Lease" (Pl. Ex. 7, R. 245, 3162) and the "Assignment of Lease and Assumption Agreement" (Pl. Ex. 7A, R. 250, 3162) all condition

rental of the Carvel building and the land on which it is erected upon the faithful compliance of the franchisee with the terms of the franchise agreement and provide, in substance, that Carvel is entitled to step into the franchisee's position as sublessee if there is any substantial breach of the franchise agreement, so that the distinctive Carvel building will continue to be used for and identified with the sale of Carvel ice cream.

The Carvel Special Formula Products

Ice Cream Mix

The findings below far from qualifying the existence, use and preservation of Carvel's special formula and secret process ice cream mix (R. *52, 434, 438, 453-454*), acknowledge Carvel's undiluted right to preserve its secrecy and "*Sell it to whomever it chose*" (R. *449*). This is the most important ingredient, by volume and cost, needed to make the finished ice cream product. Any mix for ice cream must conform to the federal standards of identity, which establish minimum and maximum limits for its constituent parts, i.e., milk fat, milk solids, sweeteners, emulsifiers, stabilizers and in some instances egg yolk solids. Wide latitude is granted for the use of fresh, frozen, powdered, or processed materials.[12]

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[12] 26 F.R. 11676, §20.1, the federal standards of identity promulgated by the Food and Drug Administration with respect to ice cream mix, provide that in addition to optional ingredients which may, but need not be added (such as liquid eggs, frozen eggs, dried eggs, stabilizer, emulsifier), the mix may include any one or more of the following ingredients: "Cream, dried cream, plastic cream (sometimes known as concentrated milk fat), butter, butter oil, milk, concentrated milk, evaporated milk, sweetened condensed milk, superheated condensed milk, dried milk, skim milk, concentrated skim milk, evaporated skim milk, condensed skim milk, superheated condensed skim

The uncontradicted testimony of the sales manager of the ice cream mix division of H. P. Hood (R. 180) shows that Carvel delivered to his company a secret formula for ice cream mix which differs from other mix formulas (R. 182, 190, 191), and which, in compliance with Carvel's insistence, has been kept confidential throughout the years from the beginning of the relationship between Carvel and this supplier (R. 191). In addition, Carvel uses another means of maintaining the secrecy by selling and delivering to its mix processors, a stabilizer-emulsifier made elsewhere by a formula which is not disclosed to them (R. 194, 199); use of this secret stabilizer-emulsifier is not the only respect in which the Carvel special formula mix differs from other formulas (R. 194). No other customer supplies its own secret stabilizer-emulsifier to the dairies (R. 196).

Carvel constantly assures itself that its secret mix formula is being used by receiving the processor's batch reports confirming the ingredients that were used in each batch "and the final laboratory test of the product" (R. 182, 254). The several supply contracts marked in evidence spell out the secrecy of the specifications, requirements for maintaining the secrecy, the furnishing of batch reports within twenty-four hours of completion of each batch, the packaging and labelling of the Carvel mix, the dairy's obligation to transport and make delivery pursuant to orders directly to the dealer of this perishable commodity, the invoicing for the deliveries on Carvel forms, the accounting

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milk, sweetened condensed skim milk, sweetened condensed part-skim milk, nonfat dry milk, sweet cream buttermilk, dried sweet cream buttermilk, and skim milk that has been concentrated and from which part of the lactose has been removed by crystallization. Water may be added, or water may be evaporated from the mix . . . ."

for all collections, subject to assumption by Carvel of credit risks, spoilage and returns; other incidental provisions provide a term of one year subject to cancellation upon ten days' written notice (Pl. Ex. 10, R. 252-261, 3186; Pl. Ex. 15, R. 337, 338-339, 345, 3205).

The supply contract with each of the processors of the secret Carvel mix selected by Carvel provides that Carvel will purchase all its requirements of the product with which the contract deals from that particular supplier (Pl. Ex. 15,[13] R. 338, ¶ 1, 3205). The processor covenants as follows (*id.* ¶ F, R. 341):

> "The processor agrees that he will deliver only Carvel mix to Carvel stores and no other ice cream mix or ice cream preparation of any kind."

The perishable nature of the mix makes direct and prompt delivery to the dealers in the small quantities they need, essential (R. 183).

The supply contract with Eagle Cone while providing that Carvel shall purchase all its requirements of cones corresponding to the specifications set forth, contains no provision, as in the case of the mix contracts, restraining Eagle from delivering other cones to the Carvel dealers. Eagle's covenant is merely that:

> "The supplier agrees to produce cones of the said design only for Carvel and for no other person."

In all other respects, the supply contracts are substantially the same (Pl. Ex. 24, R. 113, at 125, ¶ 1, 126, ¶ 4, 129, ¶ 14 (a), 3245).

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[13] The reference in the text is to the Rakestraw contract. See also, the Hood contract (Pl. Ex. 10, R. 252, 253, ¶ 1 and 255, ¶ F., 3186).

Other Carvel Special Formula End Product Components

To make the Carvel finished ice cream product, the dealer needs other ingredients and supplies. These he adds to the mix in preparation for putting the batch through his freezer to obtain the desired flavor (R. 179, 190-191). The finished product is a semi-solid that can be served as it emerges from the freezer-dispenser in an ice cream cone or in a sundae dish, or in a pint package, or it may be frozen to a low temperature and converted into the various hardened ice cream Carvel novelties (R. 192).

All puree and extract that is used by the dealer is purchased from Carvel which, in turn, has these items manufactured by firms which must make them in conformity with special formulas and specifications furnished by Carvel for each such item (R. 196-199).[14] Carvel arranges to purchase certain of the products for fruit flavorings at crop site auctions, similar to tobacco auctions; this is part of Carvel's specifications (R. 197), a circumstance of which the court below took note (R. *454*, fn. 4). It is important that the ingredients of each type of puree and extract used by the individual dealer in flavoring the ice cream mix conform exactly to Carvel formulas or specifications since an inferior ice cream product can result if a non-conforming puree or extract is used (R. 197-199). Ingredient specifications are related to the wholesomeness of the finished product as well as to its taste and general quality (R. 198). The standards specified to the Carvel suppliers are different than those used by the suppliers for their non-Carvel trade (R. 203).

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[14] The record does not contain any supply contract with a supplier of flavorings or toppings.

The various flavoring purees are packed in tin containers of pre-arranged weight, so that each tin contains the exact amount that will flavor a ten gallon can of mix; cocoa powder is packaged in bags containing exactly the amount necessary to flavor a ten gallon can of mix (R. 200, *454*). By this means, the uniformity of the Carvel finished product throughout the chain—as the findings below make plain—is further achieved (R. *448, 453*).

The Carvel Trademarks and Patents:

The Freezer

A Carvel patented narrow barrel is used in the freezer-dispenser sold by Carvel. This, like all other equipment, under the post-1955 franchise agreement may, but need not be, purchased from Carvel by its dealers (Pl. Ex. 1, R. 208, 212-213, ¶ "Ninth", 3148). Moreover, this, along with the Carvel design patented items, was found by the Court of Appeals to be "virtually without motivating significance in bringing about the [dealer's franchise] agreement." They were not "the focus of the arrangement" (R. *452*). The trial court found the patented items to be "incidental" in the Carvel distribution system (R. *56*, fn. 7).

There is no question but that Carvel regards its freezer as particularly compatible with its special formula and product ingredients (R. 197-198), and praises it in its promotional literature (R. 42). Nevertheless, it is open to the Carvel dealers to purchase a competitive freezer of comparable specifications (Pl. Ex. 1; R. 208, 212-213, ¶ "Ninth", 3148), and petitioners' counsel represented to the district court that there are many such available on the

market (*supra*, p. 8). This is confirmed by one of petitioners' exhibits (Pl. Ex. 24, R. 113 at 122, 3245).[15]

Petitioners did not produce evidence that Carvel ever denied a dealer's request to buy a competitive freezer. On the other hand, a number of exhibits demonstrate that Carvel did accept the specifications submitted for other pieces of equipment (R. 167-170; Defs. Ex. C-5, R. 295-314, 3525).[16] It is true, of course, that as an incident to the establishment of a new franchised outlet, the Carvel freezer-dispenser is part of the original "package" which a new dealer contracts to buy along with a beginning inventory. The inclusion of the freezer in the original "package" has not been shown to be a condition for the compulsory purchase of the rest of it. With regard to the subsequent purchase of an additional freezer-dispenser by a dealer who is expanding his operations, there is nothing in the record to show that Carvel discouraged or disapproved purchase of competitive freezers or other equipment.

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[15] Principal "national" companies making freezer-dispenser equipment for ice cream are identified in the exhibit as Port Morris Machine Co., General Equipment Co., Taylor Freezer Co., Sweden Freezer Co., King Freeze Co. and the Emery-Thompson Co. It is also stated that "'Mr. Softee', 'Tastee-Freez', 'Freezer Fresh' and hundreds of non-franchised operators . . . have their own ice cream making machines" (R.122).

[16] Uncontradicted evidence was introduced establishing that Carvel did in fact furnish specifications, and approve the installation of equipment meeting Carvel specifications from sources other than Carvel, by its dealers, including some of the petitioners herein (R. 167-170; Pl. Ex. 8A, § M; Def. Ex. C-5, R. 295-314; 11/27/59 Carvel letter to Hack, R. 295; 4/19/60 Carvel letter to Evangelista; R. 296; 11/2/61 Carvel letter to Mucha and Huba, R. 297; 1/25/60 Carvel letter to P. and A. Vignole, R. 297-298; 7/23/59 Carvel letter to Harriss and Wojcik, R. 299; 9/19/57 Carvel letter to Alfred and Francis Zeronda, R. 300; 9/4/57 Carvel letter to Mr. and Mrs. Frank Martone, R. 301-302; 11/2/61 Carvel letter to Mucha and Huba.

The Front Assembly Plate

This item, bearing a Carvel design patent, is included in the sign and equipment lease at a nominal annual rental (Pl. Ex. 6, R. 242, 3157). This front assembly plate which is removable (Pl. Ex. 7A, R. 250, 3162), like the signs and insignia equipment, functions to identify the Carvel product. It operates to impress a swirl as the ice cream emerges from the dispenser which is characteristic of the Carvel registered mark portraying the appearance of the product (R. 168). While all the franchise dealers are obliged to use this patented front assembly plate, its role and function is entirely promotional.

The Design Patent on the Carvel Building

The appearance, shape, style and dimensions of the Carvel building are uniform throughout the franchised chain and likewise serve the promotional purpose of making known to the public the identity and source of the product to be obtained there, namely, Carvel ice cream. This effect of the distinctive building is heightened by the neon illuminated signs and other Carvel insignia (Defs. Ex. C-2, Design Patents, 3485;[17] see R. *49*, R. *433-434;* Pl. Ex. 8A, § E, pp. 1, 10, § D, Part I, p. 1 and Part II, p. 8, 3165).

R. 302; 1/23/56 Carvel letter to *petitioners Mr. and Mrs. Paul Giberman*, R. 305; 6/17/57 Carvel letter to *petitioner Lester N. Modick*, R. 306; 8/30/57 Carvel letter to Mr. and Mrs. Murrell, R. 306-307; 8/22/56 Carvel letter to Mr. and Mrs. Caruso, R. 307-308; 5/24/56 Carvel letter to Mr. and Mrs. William King, R. 308-309; 6/8/56 Carvel letter to Mr. and Mrs. Knoch, R. 309; 9/25/56 Carvel letter to Frank Thomas, R. 310; 9/19/56 Carvel letter to Edward Pehrer, R. 310-311; 3/20/56 Carvel letter to Eli Pine, R. 312; 9/4/56 Carvel letter to Herman Eisenburg, R. 313; 5/15/58 Carvel letter to *petitioner Alfred Mueller*, R. 313-314).

[17] This exhibit like Pls. Ex. 8A was brought to the Court.

The Trademarks and Tradenames

Hardly anything is clearer in this case than the fact that the related Carvel companies use, and license the Carvel dealers to use, the Carvel trademarks and tradenames. Petitioners' contention (Their Brief, pp. 38-40), that Thomas Carvel, the owner of the registered marks, who also controls and is a principal owner of the Carvel companies, failed to authorize such use, cannot be taken seriously. Typical of the arrangement with regard to the use and licensing of these trademarks, is the testimony regarding one of the specialty products (R. 201):

> "The Court: Who owns the trademark on Lollapalooza?
>
> "The Witness: The trademark, I believe, is owned by Thomas Carvel and the use of it is granted to the various franchising corporations."

The name "Carvel" is made part of the name of each Carvel ice cream product offered for sale by the franchised dealers. Many specialty items are identified with their own registered marks, as for example: "Carvel Ice Cream Cake", "Carvel Tortoni", "Carvel Pre-Pack Tarts", "Carvel Papapalooza" and "Carvel Sno-balls" (Pl. Ex. 8A, § J, 3165). In addition, the containers, spoons, and other packaging and dispensing materials carry the imprint of the registered Carvel mark (*id.* § J, p. 23).

Obviously, this method of multiple and repetitive product identification has its greatest impact when the various Carvel ice cream products reach the consumer, mostly by personal service, rather than delivery. It is at the point of sale that the Carvel trademarks, tradenames, distinctive

building and uniform appearance of the product collectively attain a maximum degree of their promotional purpose.

Quality Control

Built-In Controls

There are two constants by which the quality control objectives of Carvel are realized. First, are the secret formulas and specifications for those supplies which are made part of the finished product (in various forms) which the consuming public buys from the Carvel dealer. The second constant is the quality control gained by pre-arranging the units of the flavoring and other ingredients for use with a ten gallon can of mix (R. 200). The Carvel secret formula mix is uniformly sold in ten gallon cans of standardized and specified weight (R. 184, 253), which, together with the other special Carvel ingredients, are accommodated to fit the freezer-dispenser (R. 197-198). These constants of quality control already mentioned in another connection, are supplemented by other techniques.

Dealer Training

The newly franchised dealer is required before opening his store to undergo full time training with an experienced Carvel dealer. (It was so stipulated, R. 150; see also R. 427). Before the new dealer can open his own store, he is tested at the end of the training period about his acquired operational "know-how" (Pl. Ex. 8A, § K, p. 3, 3165). During the training period, the newly franchised dealer learns how to apply the detailed instructions in the Carvel Manual (*id.*). The Manual or S.O.P. covers every aspect for using and cleaning the equipment, the manner of pro-

ducing various products, serving the customers and operating his retail business (*id.* § B, pp. 2, 4-5, 6-10, 13-14, 18; and § J; see also § G dealing with Sanitation, § H relating to the Carvel Supply Division, § M dealing with equipment specifications). He is taught and shown the scope of good merchandising procedures covered by the Manual, such as: standardized recipes and processes, amended and supplemented from time to time by added Manual sheets; quality and service standards, standards of physical cleanliness and appearance; promotional, advertising and showcase display techniques.

Supervision

To further insure uniformity and quality of operation by the franchisee, Carvel also employs a staff of supervisors. Their function is to visit each franchisee periodically, to assist him in any way necessary, and to inspect the franchisee's operation to ascertain that he is operating in compliance with the terms and conditions set forth in his franchise agreement and in conformity with the high standards Carvel expects of its franchisees (Pl. Ex. 8A, § K, p. 6; R. 413-414).

The Carvel Dealers' Position in the Franchise System

A dealer who operates a freezer dispenser on his premises to make and sell ice cream is within the classification of "manufacturer" under local laws and regulations, which require annual application for a permit attesting to the purity and wholesomeness of the ingredients, their use under sanitary conditions, and identification of the brand or tradename under which the products are sold (R. 329,

Massachusetts; R. 332, Connecticut; and R. 333, Pennsylvania).[18]

It is relevant to note *Riek-McJunkin Dairy Co.* v. *Pittsburgh School Dist.*, 362 Pa. 13 (1949), which held that while pasteurization and homogenization of milk do not result in a new product regardless of the changes in the milk, ice cream produced from the mix is a new and different article. The Carvel dealers' manufacturing function for obtaining the finished product requires commingling the Carvel special formula mix with the other selected secret formula ingredients, and processing them through the dispenser-freezer at appropriate temperatures and churning speed (R. 198). The point is not in dispute because petitioners requested and received a stipulation that the end product is different from the ingredients delivered by Carvel (R. 149). Petitioners further stipulated (R. 178-179) that the Carvel formula mix after delivery to the dealers is processed into an end product consisting of soft and hard ice cream in a variety of flavors. The pertinent finding in the district court reads (R. *58*):

> "The end product which was sold to the public *was Carvel ice cream*, and it was this product to which the Carvel trademark and good will attached."

The franchise agreement, like all contractual commitments, contains restraints operating to a greater or lesser degree upon the contracting parties. Under the circumstances of this case, the Court of Appeals, reviewing the

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[18] See Pennsylvania Act 483, approved May 20, 1949 and amendments, vol. 31 Purdon §§ 407, 412, 415; Conn. Gen. Stat. § 3913; Mass. Gen. Laws. Ch. 94; §§ 65 K, L, N, P; and substantially similar legislation in New York Agricultural and Market Law, Art. 4a, McKinney's Consolidated Laws, Book 2-B, § 71-a to § 71-m.

contractual restraints on the dealer in the Carvel franchising system in the light of their exclusive dealing and total requirement provisions, found that they were not proscribed by the antitrust laws; on the contrary, they served the public interest by protecting the integrity of products sold under the Carvel trademark (R. *448*).[19]

The trial court specifically found that what "draws the business to the Carvel operators" was "the uniformity of the stores . . . and the knowledge of the public of the uniformity and quality of the product" and further that: "The name Carvel constitutes a trademark of great value to the defendant and to the franchise operators" (R. *50*).

The petitioners' agreement to behave in a manner consistent with the rights and interests of other dealers in like economic positions and to protect the name and trademarks of Carvel, diminished but did not unreasonably impair their "independence", much less destroy their status as independent businessmen (R. *49*).[20] By voluntarily entering into

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[19] The reference is to the Opinion of Chief Judge Lumbard "writing for the majority in part" (R. *432*), who concluded the passage, saying (R. *448*):

> "Judge Dawson was fully warranted in concluding that in the context of the entire Carvel franchise system the requirement that no non-Carvel products be sold at the retail level is reasonably necessary for the protection of Carvel's goodwill."

[20] "The operation of franchise stores, of which Carvel is an example, is a comparatively recent development. Franchise stores differ from the older established chain store operations in which the managers of the stores were not independent operators.

"The franchise method of operation has the advantage, from the standpoint of our American system of competitive economy, of enabling numerous groups of individuals with small capital to become entrepreneurs. . . . The franchise system creates a class of independent businessmen; . . . The franchise system of operation is therefore good for the economy."

these franchise agreements, petitioners recognized that it was indispensable for them and the other dealers to adhere to the procedures for the protection of the Carvel name and trademarks. Such compliance would enable each dealer to realize his desire to be his own boss.

Benefits Conferred on the Franchised Dealer

The findings below fully supported by the record reflect the following principal benefits to the petitioners under the Carvel franchise system: (a) The dealer benefits by entering a specialized segment of the ice cream business and as a new business man immediately reaps the advantage of consumer acceptance of his products, the use of valuable trademarks and established good will which results from costly and effective promotional activities and successful experimentation and exercise of ingenuity in the development of the line of Carvel products (R. *50, 58* and *447-448*); (b) He benefits from the uniformity of the product, the uniform style in which it has been marketed, and the techniques developed and enforced for quality control (*id.*); (c) He gains competitive advantage from the incorporation of ingredients in his product made in accordance with secret formulas contributing to their high quality; (d) He benefits from his training in the merchandising of this specialized product by experienced and successful operators supplemented by the guidance in business management, merchandising, tried and uniform recipes of proven acceptance by consumers, and promotional and advertising procedures which are set forth in the Carvel Manual; (e) He benefits directly from the personal assistance offered and given by Carvel supervisors, and indirectly by the assurance that

their work of inspection and supervision is designed to maintain uniformity and high quality of the products; (f) He benefits from selection of a site for a store by those experienced in the matter and by the distinctiveness of the design and appearance of the building used by him and other Carvel dealers; (g) He benefits by the assumption by Carvel of all credit risks with relation to the items purchased from Carvel; (h) He benefits from the purchasing power of Carvel as a wholesale distributor (R. 200) of supplies purchased from suppliers who are in vigorous competition with each other (R. *443, 452*); and (i) He benefits because the price which the dealers pay Carvel "was less than they could have obtained if they bought in smaller quantities than Carvel" (R. *452*), and this applies to the price of those ingredients which are incorporated in the finished product and which the dealers are obliged to buy from Carvel, despite the 5% mark-up by Carvel (R. *443*, fn. 7).

Naturally, the full potential of these advantages is realized by the Carvel dealers in varying degrees. Their greater or lesser success differs according to their natural skill and capacity as merchandisers, their efforts, personality, ability to please customers and the variables that make one location better than another.

The Unitary Nature of the Carvel End Products

Although Carvel is a vendor of mix and flavoring ingredients, cones, supplies and equipment, it does not compete with the suppliers in those respective lines of business (R. *56-57, 443, 452*). Carvel's success is governed by the success of its franchised dealers in selling the finished ice

cream products under its name and trademarks. The dealer is told it is necessary to request that he buy from Carvel the mix and all those other items which are sold as part of the end product "because the public comes to the store to buy a 'Carvel' product—and it is a 'Carvel' quality product they sell in that fashion" (Def. Ex. C-1-B, R. 283 at 284, 3514). In this connection the trial court found that the dealers sell the public Carvel ice cream ". . . and it was this product to which the Carvel trademark and good will attached" (R. 58).

The Carvel end product is much more unitary than, for instance, a complete heating system incorporating many functioning parts or assembly of components (patented or unpatented) which can be sold separately. It is more unitary than the cameras sold with built-in light meters, which can be, and are, also sold separately. Carvel is not in the general business of a distributor or otherwise for the sale of its special formula ice cream mix, or of anything else for that matter. It restricts its role of vendor to make sales to its franchised dealers and only to them, in order that they may make the vendable ice cream to which the Carvel trademark attaches. Carvel's restriction upon the franchised dealers as buyers is limited entirely to those commodities which are incorporated within, and sold to the public as a part of, the Carvel ice cream. In that sense, under the facts and circumstances of this case, the restrictions of which petitioners complain apply to a unitary end product to which the Carvel trademark and good will attach.

These business and economic realities of Carvel's single-minded concern with the maintenance of the quality of the end product and the reputation of its name as well as

preservation of its trademarks provide roots for the findings in affirmance of the trial court:

(a) By a unanimous court that "the Carvel exclusive dealership arrangement withstands any attack on its legality" (R. *447*);

(b) by a unanimous court finding appropriate for decision of this case, the decisions of other trademark-antitrust cases, i.e.,

"Trademark licensing agreements requiring *the sole use of the trademarked item* have withstood attack under the antitrust laws where deemed necessary to protect the goodwill interest of the trademark owner . . . " (R. *448*), and also sustaining the trial court's finding that "the requirement that no non-Carvel products be sold at the retail level is reasonably necessary for the protection of Carvel's goodwill" (*id.*);

(c) by a unanimous court that

" . . . as the possessor of a secret formula for its ice cream mix, Carvel enjoyed the right to sell it to whomever it chose, and this right was not diluted by its agreement with Hood and Rakestraw to produce the mix. Carvel was free to insist that Hood and Rakestraw produce the mix solely for Carvel and subject to Carvel's wishes as to its disposition" (R. *449*);

(d) by a unanimous court that there was

"no merit in the plaintiffs' claims" that [Hood, Rakestraw and the other] suppliers would not sell non-Carvel products to the individual dealers" because "Carvel cannot be considered in competition with these suppliers . . . and such an agreement not to deal, even if established, when effected by non-competing enterprises is not illegal" (*id.*);

(c) by the court below that the facts of the case fail to qualify under the authorities as a tying arrangement because there was no proof of a tying product,—a deficiency *incurable by resort to presumption* of "dominance" or sufficient "economic power," on the law and the facts (R. *452*) and for the further reason that "the 'tied' sales here complained of . . . must be a minor part" of sales otherwise "not insubstantial" (R. *451*), but so far as the individual dealers are concerned so inconsequential as to make unlikely anything other than trivial damage (R. *451, 455*); and

(f) by further related findings of the Court of Appeals in concurrent result with the corresponding findings of the district court, that Carvel's control over the purchase and use by its dealers of the Carvel mix and other ingredients was necessary in order to protect good will under circumstances where it is practically impossible to furnish specifications to suppliers in the market, because to do so would carry no assurance of being able to preserve the quality or uniformity of the texture and taste of the trademarked products, that the attempt to do so would impose impractical and unreasonable burdens of formulation (R. *52*) and would in all events necessitate an inspection and policing system so formidable as to be unfeasible in view of the limited nature and small volume of business (R. *54*).

It is only by fragmentation of the finished product into its components that it becomes possible to find products

which are supposedly "tied," not to a "tying" product (patented or unpatented), but—as the dissent below would have it—*to license of a trademark*. The incongruity of regarding the mix, which the dissent concedes (R. *449*) is made "in accordance with a secret formula" as tied to the Carvel trademark was noted by the Court of Appeals (R. *451*, fn. 2). Although the mix is by far the most important product sold by Carvel by function and by dollar volume, the same incongruity exists as to those other ingredients which are part of the finished product sold to the public.[21] (Carvel, as already noted, is not a competitor of the suppliers of mix, flavors and cones.) The unitary nature of the finished product must rather lead to recognition of the *Carvel ice cream* as the focus of the entire franchising arrangements. The trademark which is licensed is not for mix or flavorings but attaches to the end product. The trademark on the Carvel ice cream symbolizes the good will of the business which is dependent upon uniformity and high quality.

It is in accord with the realities of this case to recognize that the economic motivation both of Carvel and its dealers for entering into franchise agreements, is centered upon the effective marketing of the unitary finished ice cream product under the Carvel name and trademarks. In this light, the validity of the Carvel franchise agreements, which in

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[21] The majority opinion after first pointing out (R. *451*, fn. 2) that sales of all "ingredients" to dealers other than mix average less than $3,400 per dealer per year and that "the record does not make it clear whether all these 'ingredients' were tied", states:

> "Two-thirds of the figure of $3,965,923 in Chief Judge Lumbard's opinion constitute sales of the Carvel secret formula mix which surely could legally be tied to the Carvel trade-mark if that mark was to retain its significance, as he concedes."

this case all embody the post-1955 provisions,[22] must be determined under the standards established by this Court applicable to total requirement and exclusive dealing agreements. Application of these standards to fact findings in which both courts below fully concurred sustains the conclusion that the restrictions of the Carvel franchise agreements were not unreasonable. In addition, both the district court and a unanimous Court of Appeals specifically refused on the facts to attribute to Carvel abuse or misuse of the Carvel trademarks. Unless there is a showing of clear error in the concurrent findings of fact by the courts below, which we submit is entirely lacking here, this appeal is without merit.

SUMMARY OF ARGUMENT

I.

Petitioners represent in their brief that what the courts below "have done is to immunize a trademark owner against the proscriptions of the Sherman and Clayton Acts" (Their Brief, p. 68). Neither the record nor the opinions disclose any basis for this assertion. There has been no departure by the courts below from the accepted and usual course of judicial proceedings in the consideration and decision of this case on any aspect of antitrust law, the law of trademarks, or in any other respect. In our view, petitioners' brief is nothing less than a plea for this Court to disregard the concurrent findings of both lower courts and to make its own findings de novo. This is con-

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[22] The separate question of price fixing under the post 1955 franchise agreement urged by petitioners will be considered in Point V, *infra*.

trary to the settled rule of this Court except upon a showing of clear error, which is wholly lacking in this case.

The decisions of the courts below affirm the validity under § 1 of the Sherman Act and § 3 of the Clayton Act of the basic agreements upon which the Carvel franchise system depends, namely: (a) the Carvel dealer franchise agreement which petitioners brought under attack for allegedly involving illegal price-fixing, and also regulation and control of the purchases by dealers of those ingredients (made for Carvel by secret formula), which become part of the end product they sell to the public under Carvel trademarks; and (b) the agreements with suppliers by which Carvel contracts, a year at a time, to purchase its total requirements of the aforementioned end product ingredients.

In the light of the purpose and scope of the relationship between Carvel and its franchised dealers, the franchise agreements were by their nature and effect found to constitute total requirement and exclusive dealing contracts. So regarded, a unanimous Court of Appeals made findings confirmatory of, and supplemental to those of the District Court, that the restrictions complained of in the franchise agreements were economically justified and represented appropriate measures for a trademark owner to assure the quality, genuineness and uniformity of the end product sold under its trademark; that their antitrust significance is ascertainable, not by the rule applied to conduct which is unlawful *per se*, but by the standards established by this Court for evaluating contractual restraints by the rule of reason. Under the latter standards, the concurrent findings were to the effect that petitioners failed to prove that the

franchise agreements constituted or effected unreasonable restraints upon commerce.

These findings and conclusions of the courts below have substantial, and for the most part uncontradicted support in the record; in any event, it is scarcely susceptible of reasonable doubt that these findings and conclusions are free of clear error.

II.

Petitioners contend that the Carvel franchise agreement includes an illegal tying arrangement. The courts below examined the matter in considerable detail. Upon findings of fact amply supported in the record, both courts found that the terms of the franchise agreement did not present the factual prerequisites of a tying arrangement; further that even if a tying arrangement were present, the evidence was sufficient to show that the franchise provisions were justified as reasonable measures to protect the good will of Carvel's business; that the end product, sold under Carvel trademarks, depended for quality, taste and customer-appeal upon ingredients specially made by secret Carvel formula; that protection of good will, on the facts of this case, by publication of standards to enable dealers to buy all the various types of end product ingredients from suppliers of their choice, would impose impractical and unreasonable burdens upon Carvel.

Petitioners find partial support for their position with respect to "tying" in the dissenting opinion below. The crux of the dissent was to recommend remand of the cause to the district court for the specific purpose of "a further hearing limited to the issue of justification." Unlike the

Court's majority and the trial court, the judge in dissent considered the evidence of justification inadequate.

Petitioners ignore the findings of both courts, expand the limits of the dissent and urge that Carvel should be compelled to divulge the specifications and standards for all of the ingredients "to any supplier from whom a licensee wishes to purchase." *At the same time* petitioners would permit the Carvel dealer to make ice cream in accordance with any other specifications, provided the consumer is informed that "it is not Carvel ice cream", unless it is sold under a different mark or name from the distinctive store identified by the public with Carvel (Their Brief, p. 45).

These contentions are not made by petitioners in any context of an attempt to show clear error. They reflect disagreement of petitioner with the findings rather than claim error documented by relevant facts or law.

We answer the further position that Carvel conditioned the sale and lease of patented equipment to the dealers upon their assumption of obligations to purchase all their requirements from Carvel or from Carvel designated sources. This is directly contrary to the findings of the courts not excluding those in the dissenting Opinion.

III.

The restrictive provisions of the franchise agreement are not in the nature of a tying arrangement. There is no "tying" product. Furthermore, a "tied" product is lacking. Carvel is not in the business of making and selling ice cream mix or other ingredients; it is not a competitor in the markets where suppliers of such articles are in com-

petition. There is vigorous competition in the markets for those commodities. Carvel is a wholesale buyer of all its requirements for resale to its dealers. Carvel sells only to its own franchised dealers. This system of business is necessarily related to the reason for the existence of the Carvel business which is to distribute by means of a franchise, the Carvel ice cream made in accordance with Carvel's secret formula and sold under its trademark. The dealers benefit from Carvel's ability to pass on to them the advantages of its buying power as the evidence demonstrates; from the constant availability of the supplies which Carvel buys on its credit and resells in small quantities to the dealers as needed; from the reputation of the end product gained not only by its quality but by its uniformity and its identification with an established trademark of great value; and further in many other ways inherent in a franchising system of distribution which enables persons of small means to establish and maintain themselves in retail businesses without the limitations which would otherwise be imposed upon them if they were new corporate employees. In the absence of factual prerequisites for tying arrangements, the restraints of the franchise agreement become measurable by standards of reasonableness applicable to total requirement and exclusive dealing agreements.

In line with what is said in the dissenting opinion, the petitioners adopt a concept of tying arrangements which has novel characteristics. Under this concept the license of the trademark becomes the "tying" product. What the dealers need to buy for incorporation into the end product is regarded as the "tied" product. This concept presents basic problems and incongruities, factually and legally.

Preliminarily, it is clear that even assuming the presence of tying characteristics, the tying element is not embraced by the language of § 3 of the Clayton Act. Such a tying device could be reached under § 1 of the Sherman Act, but in that event, the petitioners' proof must meet the standards applicable to a § 1 violation. They are more stringent than the standards applied under the qualifying "tend to create . . ." clause of § 3 of the Clayton Act.

Petitioners obtain no mileage from this concept of a tying arrangement for the simple reason that both lower courts, amply supported by substantial evidence in the record, concluded that petitioners' evidence of anti-competitive effect is woefully insufficient. This inadequacy of proof is fatal even assuming that a presumption based on trademark (by analogy to the patent and copyright cases) is invoked to cure the inadequacy of petitioners' proof of sufficient economic power over the tying product (the license of trademark), to effect a forbidden restraint on the tied products (the ingredients). The innovation of a presumption at one end becomes, under the circumstances of this case, entirely futile because of the inadequacy of proof of anti-competitive effect, at the other. The figures showing the insubstantiality of the commerce effected need not be repeated in this summary. They are found in the Opinion of the Court of Appeals (R. *451-452*).

We argue that it is inappropriate to import into antitrust enforcement a presumption based on trademark. Prior decisions show that there is no difficulty in recognizing the misuse of a trademark to cloak activities condemned by the antitrust laws. This is, of course, true of the patent and copyright cases as well. The fact situations

in those decisions reveal encroachment upon the antitrust laws, not because of, but despite, the involvement of a patented or copyrighted article. The modifying phrase in § 3 of the Clayton Act—"whether patented or unpatented"—confirms that the ascertainment of antitrust violation is not to be inhibited by such statutory advantage. This is far from saying that the existence of a patent or copyright is a substitute for proof under standards applicable to a given fact situation.

In any event, the right of trademark is not a statutorily granted monopoly. The rights of trademark go along with business or trade and may embrace a multitude of products. The widespread use of licensing trademarks is well known. The magnitude of the practice may be inferred from an examination limited to items in the ice cream field, in five states (Appendix "B" to this brief), which discloses the impracticability and undesirability of accepting the innovation of a presumption based on trademark.

The presence and importance of the Carvel secret formulas which provide built-in assurance of quality control for the end product, accentuates the impracticability of such presumption which would, in any event, prove superfluous.

IV.

As in the case of the franchise agreement viewed as a total requirement and exclusive dealing contract, so in the case of the supplier contracts under attack, the criterion for determining their validity is their reasonableness or lack of it. The concurrent findings of both courts (including the unanimous opinion of the Court of Appeals) are to the

effect that they were motivated by lawful business reasons and did not bring into being unreasonable restraint upon commerce. Findings on this score are fully substantiated in the record. There is nothing pointed out by petitioners which shows that they are clearly erroneous.

V.

With respect to petitioners' contention that suggested or recommended prices in the post-1955 Carvel franchise agreement amounts to illegal price-fixing, it is also obvious that petitioners are seeking a *de novo* determination by this court on the facts, through inferences to be drawn from them, resolution of supposed conflicts and the like.

A unanimous Court of Appeals by its own explicit findings concurs entirely with the findings in the District Court that an illegal price-fixing or price-maintenance plan or scheme, was non-existent under the post-1955 franchise agreement. The specific finding by the Court of Appeals that there is much evidence in the record to support the findings of the trial court is sufficient for the application by this Court of its settled rule not to reappraise facts *de novo* in the absence of a showing of clear error.

VI.

It has been our endeavor to address ourselves to matters of substance and importance. We submit in the light of the record as a whole, and considering petitioners' brief, that there is no indication on any of the issues involved that clear error can be found in the concurrent findings of the Court of Appeals and of the District Court below.

ARGUMENT

I.

Carvel did not make use of illegal tying agreements.

A. Petitioners by Their Argument to Show Illicit Tying Agreements Require Nothing Less Than for This Court to Disregard in Their Entirety the Conclusional Findings of the Court Below.

The petitioners begin by phrasing the questions presented on this appeal as though the Court of Appeals, from whose judgment they are appealing, failed to recognize the illegality of an exclusive dealing contract which includes "a proscribed tie-in arrangement," and the misuse of trademark protection to insulate "proscribed tying and exclusive dealing contracts" (Their Brief, p. 3). This circularity of reasoning is too obvious to deserve notice beyond observing that it definitely conditions their attempt to apply prior decisions of this Court to an exposition of the evidence directly contrary to the record and findings by the courts below (*id.*, pp. 29-35; and App. "A," to our Brief).[23] By this route, they conclude that:

> "In effect, what the District Court and Court of Appeals have done is to immunize a trademark owner against the proscriptions of the Sherman and Clayton Acts" (*id.* 68).

It will be made plain, if our summary of the record has not already done so, that no questions of this character are tendered on this appeal.

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[23] To illustrate the extent to which petitioners' exposition of the evidence is directly contrary to, and unsupported by the record and findings of the courts below we set forth an analysis of certain of the statements made by petitioners in the first nine pages of their Brief in our Appendix "A" hereto (Our Brief, pp. 1a-9a).

Petitioners' argument that this case presents unlawful tying agreements in violation of § 3 of the Clayton Act and § 1 of the Sherman Act, of *per se* character, reflects a search for a shortcut to substitute for their failure of proof (*id.* 20-29). They say that the tying product(s) which is definitionally necessary for an unlawful tying agreement under § 3 of the Clayton Act consists of Carvel's sale, loan or lease of patented and unpatented equipment "to the dealer" (*id.* 24). They say further that "a patent is sufficient to supply the requisite of 'dominance' for the application of the *per se rule* . . . to tying arrangements" (*id.*). This is followed by petitioners' acknowledgement that (*id.* 25), "The Trial Court found that there was no evidence that Carvel had the dominance . . .", and that the finding of the Court of Appeals (referring to the opinion of the Court as "the concurring Opinion"), was to the effect that Carvel's patented items cannot be considered the tying product. They stopped short of quoting that court's specific finding:

> "In this case, the patented items appear to have been virtually without motivating significance in bringing about the agreement" (R. *452*).

Accordingly, it is quite plain that petitioners are asking this Court to disregard in their entirety the concurrent findings of both lower courts and de novo to adopt the directly opposite findings presented by the petitioners. In addition, they urge adoption by this Court of the views expressed in the dissent by Chief Judge Lumbard of the court below that the holding of *United States* v. *Loew's, Inc.*, 371 U.S. 38 (1962), should be extended by presuming "from the use of the Carvel trademark as the principal feature of the Carvel

system" the requisite economic power to exert economic leverage, notwithstanding *"the absence in the record of substantial economic data"* (R. *441*). By invoking presumptive power over a tying product, petitioners assume that all proof of *justification* is precluded, and that proof of a not insubstantial amount of commerce would suffice because the availability of such presumption would automatically transfer this case to the category of a *per se* violation both under § 3 of the Clayton Act or § 1 of the Sherman Act. That this position represents a misreading and misapplication of the decisions of this Court and even a rejection of the dissenting opinion on the propriety of proof of justification (Their Brief, p. 15), will be shown later in our argument. Here it will suffice to refer to petitioners' statement of the rule which they would have this Court adopt and apply to this case, namely:

> "So long as the seller is of sufficient size to exert some power, and the amount of commerce restrained is not insignificant, the standard [of *per se* violation] is met" (Their Brief, p. 28).

Our position is that it was correctly decided below: (i) that if the Carvel trademark be assumed and regarded to be the tying element, evidence of sufficient economic leverage of the Carvel trademark is indispensable under the circumstances of this case, and that the conceded lack of evidence to prove Carvel's position of sufficient economic power is not curable by resort to presumption; (ii) that it is inappropriate to presume sufficient economic power from the license of Carvel's trademark; (iii) that there is no proof of a tying "product" within the meaning of § 3 of the Clayton Act; and (iv) that there is no evidence of substantial injury to competition required under § 1 of the

Sherman Act which governs tying arrangements not within the purview of the Clayton Act.

B. The Courts Below Found that Petitioners' Evidence Was Not Sufficient to Prove a Tying Agreement Forbidden Either by § 3 of the Clayton Act or § 4 of the Sherman Act.

The typical tying agreement involves the sale or lease of a product by a seller in possession of sufficient economic power over the tying product, to force the buyer desirous of acquiring it, to purchase another or tied product. The seller under such agreement runs afoul of § 3 of the Clayton Act upon a showing of wrongful effect upon the commerce in the tied product. The rule for ascertaining illegality applied to such circumstances, is less stringent than the criteria of illegality under § 1 of the Sherman Act. Under the less stringent rule the language of the "effect" clause of § 3 is satisfied when such a seller exacts the condition for the purchase of the tied product to an extent shown to involve a "not insubstantial" amount of commerce because its effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." On the other hand, illegality of tying arrangements falling outside the language of § 3 of Clayton depend on proof of sufficient economic power over the "tying" element to have the effect substantially to restrain free competition in the market for the tied product. *United States* v. *Loew's, Inc., supra*, at 45, 49; *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962) at 328-330; *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1 (1958) at 6, 7 and fn. 6, 9; *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961) at 326-329, 334-335; *Times-Picayune Pub. Co.* v. *United States*, 345 U.S. 594 (1953) at 608-610.

When this Court dealt in *Times-Picayune Pub. Co.* v. *United States, supra,* with a tying arrangement which did not involve a "product" under § 3 of the Clayton Act, the reasoning was to the effect that such "tying" condition would come under the interdiction of § 1 of the Sherman Act "whenever both conditions are met" (345 U.S. at 609). This referred to the stricter Sherman Act rule which requires proof of (or an appropriate basis for inferring) the existence of dominant or sufficient economic power in the market for the tying product *and* its use to restrain a substantial volume of commerce in the market for the tied product. Since the evidence in that case was found not to meet such standard of proof, the decision of the district court was reversed.

Times-Picayune, a Sherman § 1 case, did not apply the rule adopted under § 3 of the Clayton Act in *International Salt Co.* v. *United States,* 332 U.S. 392 (1947). *International Salt, supra,* affirmed summary judgment for the government in a case brought under both § 1 of the Sherman Act and § 3 of the Clayton Act. It involved forced purchase of commercial salt tied to the sale of patented salt dispensing machines. The presence of conditions affecting the sale of products "whether patented or unpatented"—as § 3 of the Clayton Act reads—led this Court to apply the less stringent rule because that section prohibited agreements (332 U.S. at 396) "which 'tend to create a monopoly', and it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop . . .".

While dominance in that case was stated to be presumed from the existence of statutorily granted monopoly over

the patented salt machines, the decision is now not understood to mean that the patent over the tying product was basic to the decision. The opinion in *International Salt* (decided on the pleadings), discloses a factual support for finding dominance, independent of the patent, namely, that (332 U.S. at 394):

> "It was established by pleadings or admissions that the International Salt Company is engaged in interstate commerce in salt, *of which it is the country's largest producer for industrial uses.*"

Understandably then, this Court found no error in the granting of the government's motion for summary judgment because further proof of a dominant position of a competitor of that status in a particular market was wholly superfluous. This provides context for the observation in the later decision of *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1 (1958) at 9, that the tying arrangements in *International Salt* were held "unlawful *despite* the fact that the tying item was patented, not because of it."[24]

It is true, of course, that *United States* v. *Loew's, Inc., supra*, is of material significance in this case for a variety of reasons. The one pertinent to the subject under discussion at this point, is not the presumption of dominance from a copyright with respect to which the case followed earlier motion picture decisions, notably *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948). What is significant here is the other half of the coin, namely, what this Court actually decided with respect to proof of anti-

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[24] The Court below makes reference to this observation (R. 454, fn. 5); see also the further statement in *Northern Pacific*, 356 U.S. 1, at 10, fn. 8.

competitive effect on commerce. If we are to understand the implications of the suggestion in the dissenting opinion in the Court below to invoke the same presumption of dominance in the case of a trademark, which in the context of the record was deemed wholly inappropriate in the majority opinion (R. *452*), it must be understood that the more stringent rule under § 1 of the Sherman Act becomes applicable to this case. This we respectfully submit, was overlooked in Chief Judge Lumbard's dissenting Opinion.

We read *United States* v. *Loew's, Inc., supra,* as showing application by this Court of the more stringent rule in affirming the conclusional findings of fact by the district court. This Court having presumed from the licensing of copyrighted feature motion picture films the existence of dominant position,[25] held that there was no question ". . . of the adverse effects on free competition resulting from appellant's illegal block booking contracts" (371 U.S. at 49). After commenting upon the inferiority of a considerable number of the tied films, the Court further elucidated the basis for illegality under § 1 of the Sherman Act, saying, (*id.*):

> "It is therefore clear that the tying arrangements here both by their 'inherent nature' and by their 'effect' *injuriously restrained trade.*"

In this perspective we refer to the specific finding of the Court of Appeals in this case that the proof which petitioners, as plaintiffs, produced "showed *neither* that Carvel had 'sufficient economic power with respect to the tying product to appreciably restrain free competition in the

[25] This Court stated that the findings of the district judge, supported by the record, confirm the presumption (371 U.S. at 48).

market for the tied product' nor that 'a not insubstantial amount of commerce is affected'. Indeed, such figures as exist would prove the contrary" (R. *451*).[26] Proof insufficient to meet the test of illegality of a violation under § 3 of the Clayton Act is all the more deficient under the more stringent measuring criteria of conduct forbidden by § 1 of the Sherman Act. *Tampa Electric Co., supra,* at 335; *Times-Picayune, supra,* at 608, 609; see also *Brown Shoe Co.* v. *United States, supra,* at 328-330. A unanimous Court of Appeals rejected petitioners' notion "that anti-competitive effects may be inferred solely from the existence of such a network of exclusive dealerships." (R. *447*). It was plain, said the Court, that petitioners failed in their burden to prove foreclosure of competition in a substantial share of the line of commerce affected; also, that petitioners failed to show that Carvel's dealership system lacked economic justification. On that account, the Court of Appeals approved of the findings by the district court, that the trademark or tradename was the cornerstone of a franchise system, and that the public interest was served by the identification of "each Carvel outlet as one of a chain which offers identical products at a uniform standard of quality." (R. *448*). These and other findings below, adverse to petitioners, disclose that the sufficiency of petitioners' proof was not evaluated within the strict boundaries of their self-limiting stipulation to establish a case of *per se* violation of the antitrust laws. To illustrate, the Court of Appeals was in accord with the finding of the district court on the facts, that (R. *59*):

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[26] The figures are summarized *infra*, Point IVA. The district court below found that " . . . the arrangement here involved is not the type which could be held illegal under the provisions of either § 1 of the Sherman Act or § 3 of the Clayton Act" (R. *57*).

"The plaintiffs made no showing, as ordinarily required under the cases, that Carvel occupies a dominant position as a franchiser of soft ice cream or seller of ice cream freezers, or even that a substantial amount of commerce in the 'tied' products was foreclosed. In the absence of these facts there is no basis for recovery. Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)."

C. The Factual Prerequisites for Illegal Tying Arrangements Are Absent in the Carvel System of Doing Business.

The courts below were correct in finding that petitioners failed to prove either the presence of a tying element, or other products which were "tied". In other words, it was found that the restrictions of the Carvel franchise agreements involved provisions for purchase of total requirements and exclusive dealing, but did not include tying arrangements. The facts which *were* proven reveal abundant support for the factual conclusions that the basic characteristics of a tying arrangement were wholly absent, as the following analysis shows.

1. Neither the freezers and related equipment which Carvel sold, nor the identifying signs or front assembly plates for the freezers which were rented for a minimal fee, nor any other ingredient which Carvel also sold, were found to be of such prominence, uniqueness or desirability as to be the motivating or focal force to induce dealers to enter into the franchise agreement for the purpose of buying any one or more of such articles. The findings are to the exact contrary (R. 452; see also R. 56, fn. 7). Primarily, then, there is no tying product in the form of "goods . . . machinery,

supplies or other commodities either patented or unpatented . . .", sold or leased, conditioned upon the purchase or lease of other goods,—within the language of § 3 of the Clayton Act. Whether it is appropriate to regard the Carvel trademark as the tying element, a suggestion in the dissenting opinion which the Court of Appeals rejected (R. *452*), will be dealt with separately, *infra*.

2. Whatever the "tying" element might be, the problem of the legality of a tying restriction is not presented in the absence of proof of a "tied" product. On the facts in this case, there are no tied products for the following reasons:

a. Judicial scrutiny of tying arrangements emphasizes that the seller conditions the availability of the desired main or tying product upon the purchase of another tied article in order to expand or improve his competitive position in the market for the tied product. This is not the case here. It is true that Carvel competes in the market with other ice cream franchising organizations like Dairy Queen, Tastee Freeze and the like and others selling trademarked ice cream products (R. *451*). However, it is equally true that Carvel does *not* compete in the various markets wherein its suppliers compete with others in the sale of mix, cones or flavorings.

b. A characteristic of a genuine tying arrangement involves the forced purchase of a tied article which is not desired by the buyer either because of its inferiority, as in the case of second rate or less desirable motion pictures compared with desirable first rate feature films (involved in *Paramount, supra*, and *Loew's, supra*), or because its compelled acquisition neither adds benefit to the buyer (as pointed out in *Northern Pacific, supra*), nor provides any

particular reason for buying the item from the seller rather than from others in the market (as in *International Salt, supra*).[27]

c. The induced purchase by gasoline dealers of TBA products sponsored but not directly sold by their gasoline supplier, demonstrates in yet another way the absence of offensive "tie-in" characteristics in the Carvel franchise system. This appears from the sharp contrasts of the evidence in this case with the basic facts shown in *Osborn* v. *Sinclair Refining Co.*, 286 F. 2d 832 (4th Cir. 1960), *cert. denied* 366 U.S. 963 and *Goodyear Tire & Rubber Co.* v. *United States*, 331 F. 2d 394 (7th Cir. 1964); see also *Texaco* v. *FTC*, 336 F. 2d 754 (D.C. Cir. 1964).[28]

In *Osborn* v. *Sinclair, supra*, dismissal by the district court of the claim for treble damages was reversed. That case presented no genuine question that *Sinclair's* position and share of the market in the tying product of gasoline was one of sufficient economic power appreciably to restrain commerce in the *Goodyear* TBA products. The tying pressure was applied due to *Sinclair's* undertaking for a 10% commission to promote and advocate among its

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[27] *United States* v. *Loew's, Inc., supra*, 371 U.S. 38 at 40, 48 and fn. 6; 49; *United States* v. *Paramount Pictures, Inc., supra*, 334 U.S. 131 at 157, 158; *Northern Pac. R. Co.* v. *United States, supra*, 356 U.S. 1 at 8; *International Salt Co.* v. *United States, supra*, 332 U.S. 392 at 396, 397.

> "To use the trial court's apt example, forcing a television station which wants 'Gone With The Wind' to take 'Getting Gertie's Garter' as well is taking undue advantage of the fact that to television as well as motion picture viewers there is but one 'Gone With The Wind'." (371 U.S. 38 at 48, fn. 6.)

[28] This Court noted jurisdiction in the *Goodyear Tire and Rubber Company* and *Texaco* cases during the October term, — U.S. —; — U.S. —.

dealers their purchase from *Goodyear* of TBA products. Earning the commission was found to be the sole business motive for *Sinclair's* policy to promote the sale of the *Goodyear* products *supra*, 286 F. 2d 832 at 834; this policy "went beyond mere persuasion or salesmanship . . . and constituted an actual requirement and condition for the continued sale of gasoline . . ." (*id.* at 836). Above and beyond *Sinclair's* profit motive for adopting the tying device, the Court of Appeals, in reversing the district court, found that the dealers' need and use for the tied TBA products were unrelated to his desire to purchase *Sinclair's* gasoline (*id.* 840). *Goodyear Tire and Rubber Co., supra*, involved the same basic business relationships as in *Osborn* v. *Sinclair, supra*, and was regarded as "a classic example" of the use by a large national distributor of gasoline of its economic power in that market to destroy competition in the market for TBA products, thereby realizing very large profits in the form of commissions from the tied products unrelated to its main business, *supra*, 331 F. 2d 394 at 395, 403.[29]

The distinctions between the business relationships in those cases and the relationship between Carvel and its dealers are very marked and apparent. (1) Unlike the independent TBA products unrelated to the market in gasoline, the dairy mix and the other special formula ingredients are not only directly related to Carvel's reason for being in business, but are the very heart and body of the finished ice cream product sold under the Carvel trademark. The cited gasoline cases presented no question of licensed trade-

[29] *Atlantic Stations* aggregated 3.4% of the total number of service stations in the United States and its sales were 2½% of the gasoline sold in the nation (331 F. 2d 394 at 403).

marks. (2) Another contrast consists of the finding that the oil company's sponsorship of the tied and unrelated TBA products had a pernicious effect upon the inter-brand competition of suppliers marketing TBA products. In this case, the fact findings are directly opposite, namely, competing suppliers of mix and other ingredients were able to compete for supply contracts with Carvel which ran for a year (R. *452*); and such competition was conceded in the minority opinion to be probably "vigorous" although perhaps not available in equal measure to smaller suppliers capable of selling to individual stores but less capable of meeting "Carvel's price and service demands" (R. *443*). (3) There is another and more fundamental contrast between the sponsorship by the oil company of TBA and the requirement by Carvel that its dealers purchase its mix and other essential ingredients. This fundamental difference rests upon the total contrast in the business relationships in the two situations. In *Goodyear, supra,* the dealership contract did not bind the dealers to buy particular TBA products. It was after the dealer was established in that capacity and during his dealership that he became subject to the gasoline producer's salesmanship and sponsorship of the TBA products, which the courts, on the facts, found to be coercive. This is altogether different from the route by which the Carvel dealer is initially apprised of his obligation set forth in the franchise to buy the essential components of the Carvel finished ice cream, and his reasons for assuming the obligation.

It is too obvious for argument that anybody can enter the retail ice cream market. One can do so as an incident to operating a food shop or a drugstore, a candy store or

an ice cream parlor. One can do so by acquiring or leasing or licensing the use of a mobile ice cream merchandising unit. If one is interested in becoming a franchise operator, he has a choice of joining one of the many franchising chains competing with Carvel. If he wants to become a Carvel dealer, it is the result of a decision in favor of selling not anybody else's ice cream, but the Carvel ice cream product under the Carvel trademark. He knows in advance that he will be selling to the public ice cream of uniform quality, standardized for him and the other dealers with respect to contents and style of service, uniformity of the structure, similarity of the exterior and interior appearance of his store,—as compared with the stores of the other Carvel dealers,—and that he will have the opportunity to benefit from the established consumer acceptance of the Carvel product presented to the public through various insignia and other promotional devices featuring the Carvel name, not his own. If in electing to become a Carvel dealer, he gives up some measure of his independence,[30] it was his decision so to do, for the purpose thereby to make more and not less money out of his business. In this context, the obligations which he has undertaken in the Carvel franchise agreement possess none of the characteristics of a tying arrangement, but rather of a total requirements and exclusive dealing relationship.[31] So regarded, the Car-

[30] He also loses some independence by the need for complying with health laws etc., and qualifying to obtain and keep his permit to process and sell perishable food products, etc.

[31] We have already shown (*supra*, pp. 7-10) that the complaints in the actions instituted by the petitioners reveal no claim based on illegal tying agreements; that their grievances against Carvel were predicated on the restrictions of their franchise agreements relating to total requirements and exclusive dealing; that with respect to their grievance concerning the relationship between Carvel and its sup-

vel franchise agreements were by concurrent findings of the district court and a unanimous Court of Appeals found reasonable and legally justified (R. *446* to *448*; *R. 47-51*; R. *54-59*).

d. What is presented in this case to serve as the prerequisite "tied" product (or products) represents a fragmentation into its component parts of the unitary finished ice cream sold under the Carvel trademark for the distribution of which, through franchised stores, Carvel exists. A shorthand confirmation of this is the finding in the district court (R. *58*): "The end product which was sold to the public *was Carvel ice cream,* and it was this product to which the Carvel trademark and good will attached" (italics in original). The restrictions of the franchise agreement referring to all those ingredients which are converted into and sold as part of the end product, are not infected with tying characteristics or motivation because, said the district court, they ". . . *are aimed primarily at control of quality and are not part of a design by Carvel to monopolize business in any of these fields.*" (R. *62*); the findings of the Court of Appeals are in accord (R. *453*).

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pliers, they were relying on unlawful kick-backs (*supra*, p. 9), that reliance on the sale of equipment as a tying product in an illicit tying arrangement was an after-thought introduced in their brief after the antitrust trial (*id.*); that their reliance on the Carvel trademark as the basis for a presumption in their favor was evident for the first time in their petition to this Court for a writ of certiorari predicated on the point suggested in the minority opinion below (*id.*); that petitioners' counsel made pre-trial representations to the district court that Carvel does not own patents on a freezer, and that similar and better machines are available (*id.* p. 8); and in addition, Carvel's rights of trademark and copyright were wholly imaginary or fictitious (*id.* p. 8).

Furthermore, the guarantee aspect inherent in sales to the public under a trademark deserve consideration in this connection. Carvel's exposure to liability and injury to its good will, is a realistic confirmation of the need and reasonableness of the restrictions designed to effect quality control over the unitary finished product. The district court concluded that any defects in quality over which there would be no control in the absence of the requirement to use Carvel special formula mix and ingredients in the end product . . . "would detract from the Carvel name and good will . . . . Carvel is not by these restrictions taking any business for itself at expense of its competitors and no injury to competition is shown" (R. *62*).

Exposure to such risks of defect in the Carvel finished product was found by the Court of Appeals to bear upon the propriety of the restrictions (R. *453*). We suggest this is within the rationale of *Pick Manufacturing Co.* v. *General Motors Corp.*, 299 U.S. 3 (1936) *aff'g.* 80 F. 2d 64 (7th Cir. 1935). It is Carvel's responsibility for the purity of the finished product which the dealers put before the public. We are referring to the Purity Pledge (Def. Ex. C-8, R. 425, 3482) which is prominently displayed by the dealers to attract patronage but with the inevitable effect of injury to Carvel's good will and reputation of its business if the Carvel finished ice cream products are found inferior or defective.[32] This is the form of representation to the public in the name of Carvel (*id.*):

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[32] Petitioners argue that Carvel has no need of controlling quality because the dealers under provisions of the franchise agreement carry sizable products liability insurance, and furthermore, because local law and regulations require the dealers to be licensed as retail manufacturers and also designate the proper "contents of ice cream mix by

"*CARVEL*

Purity Pledge

. . . all pure, fresh, laboratory-tested products, manufactured under special formula by sanitary equipment and served in hygienically clean stores. Strict Carvel supervision maintains these high standards for your protection.

YOUR LOCAL CARVEL DEALER."

We have shown in this section that the facts of this case do not display, in purpose, operation or effect, any of the characteristics of a tying arrangement forbidden by the antitrust laws. Indeed, it can as readily (if not more so) be said here, as was said about *Times-Picayune, supra*, in the opinion of this Court in *Northern Pacific*:

> ". . . There was no tying problem at all since only one product was involved and that, in any event the defendant did not possess sufficient economic power in the . . . market to bring [its practices] within the principle of per se unreasonableness" (*supra*, 356 U.S. 1 at 10).

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law" (Their Brief, p. 43). These arguments altogether missed the point of exposure to injury of the good name and reputation of Carvel resulting from lack or ineffectiveness of quality control or the sale of inferior or defective Carvel ice cream products.

II.

It is inappropriate to invoke presumptive economic power based on license of a trademark, nor would it make any difference on the facts in this case so to do; findings by the Court below to this effect are not clearly erroneous.

A. Decisions in Cases Involving Illicit Tying Agreements Where the Tying Product Was Patented or Copyrighted, Were Predicated Not on Presumptive, but on Evidentiary Proof of Sufficient Economic Power.

An agreement under scrutiny for anti-competitive effects may just as readily fall within the ambit of § 3 of the Clayton Act whether the tying product is patented or unpatented. Where a patent is involved the lawfulness of the tying clause ". . . must be ascertained by applying to it the standards prescribed by § 3 as though the leased article or its parts were unpatented." *International Business Machines Corp. v. United States*, 298 U.S. 131 (1936) at 138. The purpose of such language in the Clayton Act was to exclude the possibility of giving a patented article exceptional treatment for which there would be no tenable basis other "than the protection of its good will" where this can be achieved by methods . . . which do not tend to monopoly and are not otherwise unlawful" (*id.* 140). Nor does it matter whether the tying product is or is not copyrighted. The finding of illegality is based on evidence of unlawful use of the copyrighted product and the resultant injury to commerce appraised by the same standards as would apply if the tying article were not copyrighted. *United States v. Paramount Pictures, Inc.*, *supra*, at 144.

This is also evident in *Loew's, supra,* from this Court's exposition and affirmance of the findings in the district court (189 F. Supp. 373).

It appears, then, that the immediate impact of the presumption on the patented or copyrighted product is that the statutorily granted monopoly will not entitle its owner to any special treatment. In that sense, it may be said of all the cases of this character as this Court in *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1 (1958) said of *International Salt, supra* (*id.* at 10), that the tying arrangement was held illegal "despite and not because" of the patent or the copyright.

B. Although It Is Inappropriate Generally to Attribute by Presumption to an Owner of a Trademarked Article Sufficient Economic Power to Restrain Competition, To Do So Would Make no Practical Difference in This Case.

It has never been thought that the existence of a trademark or its licensing, inhibits enforcement of the antitrust laws. This is shown by *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951).[38] Despite the important role played in that case by trademarked products, the unlawfulness of the conduct under scrutiny was ascertained without reference to presumptions. In *Timken* there was proof of an agreement to allocate trade in different

[38] Anchor Serum Co. v. FTC, 217 F. 2d 867 (7th Cir. 1954) is similar to *Timken, supra*, in the sense that an attempt was made to use the license of a tradename to cloak activities which were found on the facts to violate § 3 of the Clayton Act. It is of little, if any, persuasive value in the context of this record before the Court because it was found that the exclusive right to the trade name "Anchor" under which a serum was being marketed to wholesalers in veterinary supplies, had been lost to others who had acquired independent rights to it (*supra* at 869).

markets and this was held to be a *per se* violation, this Court saying with relation to the trademark aspect of the case (*supra*, 341 U.S. 593 at 598-599):

> "Furthermore, while a trademark merely affords protection to a name, the agreements in the present case went far beyond protection of the name 'Timken' and provided for control of the manufacture and sale of antifriction bearings whether carrying the mark or not."[34]

Similarly, the use of a secret formula and secret process by a manufacturer of a pharmaceutical product could not serve to shield the owner from the illegal effects of a plan to control the resale price of the finished article after it was sold to a buyer. *Dr. Miles Med. Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911), 402, 403.

Timken shows that the nature of the transaction and not the existence of a trademark or secret process governed the propriety of applying the *per se* rule. Here, if the license of the Carvel trademark is regarded as the "tying" element which was suggested in the opinion of dissent below (R. *441*), the applicable standard would not be the one customarily applied to *per se* violations. If the Carvel

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[34] See the observation concerning the language in *Timken* quoted in the text in the Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), which after calling attention to the first sentence in the quotation from that decision, said (at p. 87):

> "The Timken case, therefore, does not cast any cloud upon restrictions in trademark licenses as such. This Committee believes that as in the case of patents, valid trademark rights may provide a lawful main purpose to which reasonable restriction on competition may be properly ancillary and therefore legal. We also believe that unpatented inventions, know-how, or other trade secret information may give rise to a lawful purpose to which some restrictions on competition may be reasonably ancillary."

trademark is viewed as attached to a vendable product, that product is the Carvel finished ice cream, with the result that the component parts of that finished product could hardly be treated as "tied" products. Consequently, on this premise the question presented for decision would be the effect of the total requirement and exclusive dealing provisions of the Carvel agreements which apply only to those components which are sold to the public as part of the finished product. Decision of that question would apply not the *per se* rule, but the rule of reason. On the other hand, if it is the trademark license itself which is regarded as the tying element to which the sale of the Carvel components is tied, the question presented for decision would be a tying arrangement which comes within the purview of § 1 of the Sherman Act and not § 3 of the Clayton Act.

Several interesting fact situations bring this point into clearer focus, namely cases where the tying element was not a product. *Columbia Broadcasting System* v. *Amana Refrigeration Inc.*, 295 F. 2d 375 (7th Cir. 1961); *Crawford Transfer Co.* v. *Chrysler Corp.*, 338 F. 2d 934 (6th Cir. 1964); *Brown Shoe Co.* v. *FTC*, 339 F. 2d 45 (8th Cir. 1964). *Amana, supra*, presented for decision the antitrust effect (pleaded in a counterclaim) of a claimed offending condition which was tied to the "sale" of television time (*supra*, 295 F. 2d 375 at 378). It was pointed out that § 3 of the Clayton Act "does not apply to 'tie-ins' involving services" (*id.*). *Crawford, supra*, affirmed judgment of dismissal of a treble damage action tried without a jury. That case involved a compulsory condition on Chrysler dealers to accept a transportation service designated by Chrysler, the cost of which was charged to the purchase price. It was held that Chrysler was not guilty of a tying arrangement

in violation of § 1 of the Sherman Act, 338 F. 2d 934 at 939. The operative exonerating reason was the finding that Chrysler did not seek to invade and dominate the automobile transportation carriers' business. While Chrysler saved millions of dollars by means of this transportation system "it received no direct profits from the transportation carriers" (*id.*). By analogy to the facts and findings in this case, Carvel has no interest in the business carried on by the dairies or suppliers of flavorings.

In *Brown, supra,* the alleged offending conduct consisted of the offer by the seller franchising organization to its shoe dealers of various services beneficial to them on condition, however, that they concentrate upon the promotion of the seller's line of products. The court set aside the order and opinion of the Commission, and in so doing, pointed out a number of considerations that are directly pertinent here, namely: (a) Unlike the situation in the decision in *Northern Pacific, supra,* where it was found that the condition upon which the railroad sold or leased land was of no benefit to the buyer, *Brown* by its condition did offer beneficial services to its dealers which, of course, is in accord with the facts and findings in the instant case; (b) While Brown's services, like the licensing of Carvel's trademarks, were attractive to dealers, Brown like Carvel, had no monopoly or dominant position because dealers could obtain similar services from other shoe distributors, just as Carvel dealers had the opportunity to obtain franchises from competing ice cream chains, or to enter the business of retailing ice cream some other way.

Under these circumstances, the Court in *Brown,* as did the Court of Appeals below, decided that the " . . . fran-

chise stores program was not an unlawful tying arrangement and that there was a complete failure to prove an [unlawful] exclusive dealing agreement . . ." (*supra*, 339 F. 2d 45, at 54, 55, 56).

We respectfully invite attention now to the basis on which the Court of Appeals premised its decision on this aspect of the case:

1. The Court found that no basis existed for curing "the first of the deficiencies in proof as to economic power" by presuming its existence from the licensing of a package of trademarks, design patents, and patented components in a freezer. On the facts, the patented items had no motivating significance in bringing about the licensing agreement. As concerns the licensing of the Carvel trademark, it was possible for a trademark to have such prominence that its license coupled with further condition would be unlawful--"but such a trademark would satisfy the market dominance test of *Times Picayune* and *Northern Pacific.*" The figures show that Carvel is not such a mark" (R. *452*).

2. The second main premise consisted of evaluating the facts in this case in the light of principles reflected by precedents (and distinguishing those not applicable), with the resultant conclusion that the record affords no sufficient basis for upsetting the finding in the district court that Carvel did nothing more than adopt proper means for assuring compliance with its standards which the protection of its good will justified (R. *453*).

3. The final premise for the decision of the court below consisted of an analysis of the evidence in the record dealing with the nature and amount of commerce involved (R.

451-452). The thrust of this analysis was to show that even if "the first of the deficiencies in proof as to economic power" were remedied by resorting to presumption, additional deficiencies in petitioners' proof would still remain uncured for lack of evidence to show the requisite adverse effect upon commerce. The figures cited by the Court, apparently drawn from plaintiffs' Exhibit 24 (R. 113, 3245),[35] showed that in the tri-state area of New York, Connecticut, and Massachusetts, Carvel dealers aggregating 250 out of a total of 125,000 outlets selling ice cream cones amounted to "one-fifth of one percent of the outlets and apparently to about one per cent of the business"; that the balance of the Carvel stores were found principally in two other states, New Jersey and Pennsylvania, and the rest scattered through a number of other states (R. *451*). Furthermore, while Carvel's aggregate sales were "not insubstantial," the court concluded that "the total sheds no light on the amount of 'tied' sales here complained of, which common sense tells us must be a minor part" (*id.*).

Further analysis by the court revealed the "insubstantiality" of the commerce affected (*id.*). The sales of all ingredients, excluding mix, averaged less than $3,400 per dealer per year, and even so, "the record does not make it clear whether all these 'ingredients' were tied" (*id.* fn. 2). In the light of these facts, the court concluded that the amount of commerce was "not consequential" and that money damage to petitioners "was even less so" (R. *451*). With relation to ice cream cones "whose tie-in was hard-

[35] Other statistical data showing Carvel's share of the market in the principal ingredient, namely, mix, is found in Def. Ex. C-9 (R. 315, 3490), Def. Ex. C-11 (R. 315, 3500), and Def. Ex. C-12 (R. 318, 3501).

est to justify in terms of quality control," the purchases averaged $460 per dealer per year (R. *451*). Carvel's mark-up, shown by the figures to be about 5% or about $25. per dealer, resulted in trivial damage to petitioners, if any, "since the price Carvel charged them was less than they could have obtained if they bought in smaller quantities than Carvel . . ." (R. *452*).

Finally, the court below inferred that it was the triviality of whatever financial hardships the plaintiffs may have suffered that accounted for their willingness " . . . to limit themselves to *per se* violations rather than incur the expense of assembling market data to gain what at best would be a negligible recovery" (R. *455*).

In the perspective of these factual findings on the evidence (which are, of course, entirely confirmatory of similar fact evaluation by the district court), it becomes clear that reliance on a presumption based on licensing of the trademark would operate only partially to diminish petitioner's burden of proof regarding existence of sufficient economic power. It would leave undiminished the burden to prove the forbidden injury to commerce. The demonstrated paucity of petitioner's evidence in such other vital respects, leads inevitably to the conclusion that petitioners did not and could not show clear error in the decisions below.

C. Neither Precedent Nor Trade Usage Suggests the Propriety or Necessity for the Innovation in Antitrust Law of Presuming Sufficient Economic Power to Restrain Commerce from the License of a Trademark.

Unlike the proprietor of a patent invention, the owner of a trademark may not make a negative or merely prohibitive

use of it as a monopoly. It is settled doctrine that a trademark confers no monopoly as that term is known in patent and copyright law. The trademark is merely a commercial signature which identifies the goods sold under it to the public and facilitates the protection of good will. *United Drug Co.* v. *Rectanus Co.*, 248 U.S. 90, 97-98 (1918). The same trademark may be used by different owners on products not competing with each other as shown by *American Steel Foundries* v. *Robertson*, 269 U.S. 372, 380 (1926) which confirms that even the exclusivity of the rights granted by trademark are special and limited. In the sense that a trademark goes along with a business, the rights of trademark have wide latitude. *Menendez* v. *Holt*, 128 U.S. 514 (1888). That decision affirmed grant of an injunction restraining infringement of "La Favorita", a trademark upon a brand of flour. Holt & Company were not the actual manufacturers of the flour, a circumstance which "does not deprive them of the right to be protected in the use of that brand as a trademark" (at 520). It was a symbol which gave evidence of the skill, knowledge and judgment of the owners, certifying to the merit and uniformity of the finished product. The infringement which was enjoined was an injury to good will, defined long ago (in terms still meaningful today), as "nothing more than the probability that the old customers will resort to the old place" (*id* at 522).

While statutory benefits of registration under the Lanham Act are important, the basic rights of trademark are not statutorily granted but are part of the common law of unfair competition. Accordingly, even an unregistered mark applied to goods which are manufactured for its owner, is enforceable. It is sufficient if the goods "passed

through his hands in the course of trade and that he gives to them the benefits of his name and business style" *E. F. Prichard Co.* v. *Consumers Brewing Co.*, 136 F. 2d 512 (6th Cir. 1943) at 519, *cert. denied*, 321 U.S. 763.

A fairly recent decision by the United States Court of Appeals for the Second Circuit, *Dawn Donut Company* v. *Hart's Food Stores, Inc.*, 267 F. 2d 358 (2d Cir. 1959), had occasion to apply several principles of trademark law pertinent to this case. The case involved the scope of protection available to the owner of a trademark, used in the distribution of doughnut mix to bakers in various states who upon converting ", sold the finished baked items under the trademark. The mark was registered under the Lanham Act which gives nation-wide protection. It was held, however, that the rights to enforce the trademark could be lost temporarily for failure to use it in a particular area, where the defendant, without intention to infringe, used a similar mark in due course of business. The Court, while confirming that the mark could be used by a "related company" [Which by definition would include the Carvel respondent companies using trademarks owned by the person (Thomas Carvel) who controls them], stressed the affirmative duty upon the licensor to exercise "supervision and control over the operations of its licensees" lest the public be unwittingly deceived (*id.* at 367).

Petitioners' contention that the Carvel corporations did not by use of the Carvel trademarks acquire any good will to protect, is without merit; their use by the several Carvel corporations was certainly authorized by Thomas Carvel, and an oral license is sufficient. *Belden* v. *Zophar Mills*,

34 F. 2d 125 (2d Cir. 1929).[36] Nor have the Carvel trademarks suffered impairment through their use by the Carvel corporations, as licensor, to franchise the Carvel dealers. See Lanham Act, 15 USCA § 1055, also *Keebler Weyl Baking Co.* v. *J. S. Ivins' Son*, 7 F. Supp. 211 (E.D. Pa. 1934).

The insufficiency of the proof of actual inadequate inspection and supervision by the trademark owner of its licensees, led the court, in *Dawn*, to affirm the denial by the district court of an injunction, *supra*, at 368. The mere provision in the contract with franchisees who purchased the mix to use it "as directed and without adulteration" was found defective because they "failed to provide for any system of inspection and good will" by reason of which " . . . plaintiff could not know whether these bakers were adhering to its standards in using the mix . . . " (*id.*);[37] for another example of the loss of the rights of trademark through omission in the licensing agreement to

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[36] Petitioners in their brief mistakenly challenge the right of Carvel respondents as licensors to license use of the Carvel trademarks (Their Brief, 39-40; compare R. 201, 207). Petitioners' counsel during the antitrust trial offered, and the trial judge read into the record made by Carvel in a pleading in another case to this effect (R. 207):

> "The public has come to associate and identify the defendant's trade-marked products and trade name with the defendants' patented design building, custom-built equipment, signs and insignia and special business techniques."

[37] The court's further remark in this connection is instructive in this case (in *Dawn Donut id.* at 369):

> "Thus I do not believe that we can fairly determine on this record whether plaintiff subjected its licensees to periodic and thorough inspections by trained personnel or whether its policing consisted only of chance, cursory examinations of licensees' operations by technically untrained salesmen. The latter system of inspection hardly constitutes a sufficient program of supervision to satisfy the requirements of the Act."

provide fixed standards for the licensee to follow, see *Braig* v. *Ductraine*, 319 Mass. 711 (1946).

Thus, these various and variable rights of trademark differ in many respects from the definite monopoly granted with respect to specific products by the laws of patent and copyright. What the owner of a trademark acquires by statutory registration, is rather a group of privileges, identifying a method or style of conducting business which may apply to many products, sometimes to their components without reference to the finished products, and sometimes to the finished products without reference to their components—but in all events, requiring for their continued unimpaired enforceability, the discharge in a realistic way of inspection and supervision. The scope and purpose of the supervision in relationship to justifiable steps for the protection of the good will of the business in which the trademark is used, will be mentioned later. Here, it is pertinent to show in the light of the cases discussed above that a presumption of an economic power to restrain trade in an antitrust sense would frequently, if not normally, embrace an entire business or substantial segment of it. To introduce such a presumption would represent an innovation in antitrust law which would confuse rather than facilitate evaluation of alleged antitrust implications in the use of the trademark. No such presumption has been found necessary in the past, nor is it necessary now because, as *Timken, supra,* points out, evidence of the misuse of a trademark may serve to highlight a plan to flout the Sherman or the Clayton Acts.

While the suggested presumption might provide a weak and superfluous evidentiary tool in antitrust matters, it would, more probably, serve to stigmatize broad areas of

business. Aside from limited and special situations where the presumption would not be necessary, the licensed trademark operates in aid of, and not as a restraint upon, competition. "Trade-marks, indeed, are the essence of competition, because they make possible a choice between competing articles by enabling the user to distinguish one from the other. Trade-marks encourage the maintenance of quality by securing to the producer the benefit of the good reputation which excellence creates." H. Rep. No. 944, 76th Cong. 1st Sess. 2-3 (1939). An apt illustration is found in *Drop Dead Co.* v. *S. C. Johnson & Son, Inc.*, 326 F. 2d 87, 96 (9th Cir. 1963), *cert. den.* 377 U.S. 907 (1964) where a defendant, answering allegations of trademark infringement, set up antitrust violation in defense. This was founded on registration of multiple marks by a large company which spent twelve million dollars in advertising the single trademarked product and showed fifty million dollars from its sales in a period of five years. The court in affirming the judgment of permanent injunction below, declined to infer breach of the antitrust laws saying, that the promotional and competitive use of the trademark "constitute the sort of aggressive competition and promotion that antitrust laws seek to protect."

The economics of trademark licensing cannot be assumed to be so infected with anti-competitive purpose and effect as to justify a presumption that the licensor has acquired sufficient economic power immediately or prospectively unlawfully to restrain competition in the trademarked product, or other article. The case last referred to illustrates, of course, that big business makes use of trademark licensing. The practice, however, is just as much, if not more, prevalent in small business, particularly food items. The

owner of a trademark with limited capital, as in the case of Carvel, is very often enabled to distribute a quality product in competition with very well established corporations in the field by means of licensing. The ability to do so gives impetus to develop marks of quality. The licensing of trademarks fosters dispersion of managerial and technical know-how, which makes it possible for the licensees to enter fields of business which they would not otherwise be able to do. The licensees, like the Carvel dealers, are able to "cash in" at once on the built up consumer acceptance of the trademark and the product; they also reap the benefit of their licensor's research, promotion and advertising which they could individually neither afford nor contemplate. Therefore, it would not be fair to infer by presumption that a trademark license always and necessarily provides indicia of antitrust infractions. Cf. *United States v. E. I. Du Pont De Nemours & Co.*, 351 U.S. 377, 393 (1956).

We respectfully invite judicial notice [see *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 332 (1961); *Parker v. Brown*, 317 U.S. 341, 363 (1943)], of our tabulation (Appendix "B" to this brief) based on data published in the Official Gazette of the Patent Office showing a plethora of registered trademarks by owners in New York, New Jersey, Massachusetts, Pennsylvania and Connecticut, which are used in the sale and distribution of ice cream products. This data (which does not include the Carvel trademarks), reveals the presence of the very largest[38] as well as the little

[38] Appendix "B" to this brief shows the presence in the field of trademarked ice cream products of such giant firms as General Foods Corp., National Dairy Products Corp., The Borden Co., General Baking Co., Good Humor Corporation, Standard Brands Inc., Foremost Dairies,

or unknown firms who utilize trademarks in the ice cream business in competition with Carvel and its dealers in the aforementioned five states.

III.

Carvel's procedures under provisions in the franchise agreement, to assure quality control and uniformity of the ice cream sold under the Carvel trademarks, are economically justified as measures to protect good will and to safeguard the trademarks; the concurrent findings of the courts below to this effect are not clearly erroneous.

A. The Uniformity, Quality and Product Integrity of the Carvel Ice Cream Are Maintainable through Carvel's Secret Formula Processes and Specifications.

The findings in the courts below confirm the existence and use of the Carvel special formula mix and other essential ingredients which comprise the final product (R. *438, 449, 453; 48*). This is supported by evidence in the record which is not contradicted. Thus, not only the Carvel mix but the syrups, toppings and flavorings are made up for Carvel to its special formulas and specifications (R. 197, 198, 199). The secrecy of the formulas and specifications are preserved and such products are not available in the general market among the vendors of such supplies (R. 200, 203). The fact that others make and sell ice cream ingredients for the making of ice cream of good quality does

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Inc. and Hershey Creamery Co. In addition, are such far-flung chain stores as The Great Atlantic & Pacific Tea Co., Inc., Acme Markets, Inc., First National Stores, Inc., Food Fair Stores, Inc. and The Grand Union Company.

not alter the fact that the Carvel ingredients are made by secret formula. Nor does the availability even of comparable goods make any difference because it may not be assumed that they may be used interchangeably. Other products though "just as good," perhaps, may produce a bad product, since the Carvel components are geared to assure the compatability of each ingredient with the mix and the dispensing machine. This assures uniformity and quality of the end product (R. 197-198). Even the cones are governed by specifications of design, precise measurement as to height and diameter and the manufacturer is obligated under the supply contract to make cones to these specifications "only for Carvel and for no other person" (Pl. Ex. 11, R. 264, 265, 3187).

In considering the justification for procedures to protect good will, it becomes relevant to consider the legal status of trade secrets. The rights of ownership in trade secrets are not in the nature of "property". Nor are they conferred by statute as in the case of patents, copyrights or trademarks. Yet, the federal courts enforce their exclusivity and confidentiality by injunction and damages. *E. I. Du Pont de Nemours Powder Co.* v. *Masland*, 244 U.S. 100 (1917); *Franke* v. *Wiltschek*, 209 F. 2d 493, 493-498 (2d Cir. 1953); *Vitro Corporation of America* v. *Hall Chemical Co.*, 254 F. 2d 787 (6th Cir. 1958); *Minnesota Mining & Mfg. Co.* v. *Technical Tape Corp.*, 23 Misc. 2d 671 (Sp. Term We. Co. 1959), aff'd 226 N.Y.S. 2d 1021 (1962). A brief summary of the decisions will suffice for the limited purpose at hand.

The right of secrecy is protected not on the theory of reward for the inventor, but to protect him against loss

from a breach of faith. *Franke* v. *Wiltschek, supra.* The secret need not amount to an invention. Nor does it make any difference that it may be discoverable by independent experimentation. Its value and privacy are recognized as long as a substantial portion of the secret is preserved. A disclosure to employees or by contract to facilitate conduct of business with its use does not result in its dissipation. A trade secret consists of any formula, pattern or device, process of manufacturing, treating or preserving materials, which is used in one's business and gives the owner competitive advantage over those who do not know it and those not entitled to use it. More elaborate definitions are found in Restatement of Torts, Section 757. The cases which we have cited refer to numerous applications of what is stated here in a great variety of contexts. What is significant is that Carvel devised and now uses secret formulas, processes and specifications which have become commercially valuable.

The purpose of having trade secrets in business, and taking elaborate precautions in contractual arrangements with suppliers to preserve them, is lawful. Inasmuch as Carvel is also the licensor of trademarks under which finished products incorporating components are made by secret formula, it is in the position all the better faithfully to discharge the affirmative legal duties resting upon a trademark owner. *Dawn Donut Co.* v. *Hart's Food Stores, Inc.*, 267 F. 2d 358 (2d Cir. 1959). These affirmative duties as *Dawn Donut* points out consist of more than inspection and supervision of licensees. The trademark licensor must be careful to provide in the contract with licensees specific directions to assure product integrity, and standards of uniformity and quality control. Yet, this is precisely the

nature of the provisions in Carvel's agr nents with its suppliers and in the franchise agreements upon which petitioners predicate their claims of *per se* violations of the Sherman and Clayton Acts. This highlights the defects in their original conception of the burden of this case and the nature of the evidence which they would have to produce. It also demonstrates the untenable nature of their position that the decisions of the courts below can be found clearly erroneous.

B. Carvel's Measures by Contractual Provisions and Conduct thereunder to Maintain Ingredient and Product Integrity Were Well Within What Trademark Law Expected and Authorized a Licensor To Do.

There is nothing at all in the record to show, or from which it may be fairly inferred, that Carvel's agreements and conduct went beyond the limits of what Carvel as the owner of a trademark and secret processes was entitled or authorized to do for the protection of the marks, the secret formulas, the products and the good will of the business. The Court of Appeals below, (per Chief Judge Lumbard, writing on this aspect as on every other aspect, except "tying", for a unanimous court), found on the facts and concluded on the law by application of standards established in prior decisions of this Court, that the Carvel franchise agreements and contracts with its suppliers were not unreasonable, that they were motivated by lawful purpose and withstood attack on their legality. In the absence of convincing proof of predatory purpose in the licensing of trademarks as illustrated, for instance, by *Timken*, *supra*, and *Anchor*, *supra*, the Carvel agreements

and system of doing business fell within the obligatory and permissive scope of what a licensor may lawfully do.

In view of the trademark cases previously cited and discussed, it seems necessary now merely to refer, without discussing, to the trademark and the trademark licensing cases found in the opinion of the Court of Appeals (R. *448*) and in the opinion of the District Court (R. *50*); and to a number of decisions sanctioning control of ingredients. Perhaps the best known cases validating, under trademark law, the right of a licensor to control by elaborate contractual regulation and inspection, procedures of the manner for using the chief ingredients and the production of the entire finished product, are the *Coca-Cola* cases.[39]

The *Coca-Cola* decision in *Butler* (cited in the footnote) illustrates far more detailed regulations and supervision than Carvel attempted on the theory that the finished product was unitary in nature. The purpose was to insure wholesomeness and uniformity of quality of the trademarked beverage made by secret formula.[40]

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[39] Coca-Cola Co. v. Bennett, 238 Fed. 513 (8th Cir. 1916); The Coca-Cola Bottling Co. v. The Coca-Cola Co., 269 Fed. 796 (D. Del. 1920); Coca-Cola v. J. G. Butler & Sons, 229 Fed. 224 (E. D. Ark. 1916).

[40] The licensor set the standards for the product which was to be bottled. All plants were subjected to a system of inspection and supervision to insure a sanitary and wholesome product. Inspectors, who were required to make reports, also took samples of the product both before and after the syrup had been mixed with the carbonated water. The inspectors were equipped with gas test gauges, hydrometers, and other instruments to enable them to determine whether or not the product was being put up in accordance with instructions. Other instruments were used to test each machine used by the bottler to determine whether the machine was throwing the right amount of syrup into each bottle. The samples taken were chemically examined, and

Similar approval of ingredient control techniques, in degree dependent upon the nature of the ingredients and finished article, are found in other cases.[41] The only question remaining now on this aspect of the case is whether it is really necessary for Carvel to abandon its system of quality control, and as petitioners urge (Their Brief, p. 45), to divulge the Carvel secret specifications and standards to any supplier with whom a licensee wishes to deal. We submit this approach has no validity in antitrust law and further that on the facts in the record, petitioners' suggestion is absurd.

C. On the Evidence in this Case, Disclosure of Formulas, Specifications and Standards for Those Essential Ingredients Which Are a Part of the End Product Sold to the Public Would Make Control of Quality and Uniformity Financially Unfeasible, Ineffectual as a Practical Matter, and Would Damage Carvel's Trademarks and Good Will; the Concurrent Findings by the Court of Appeals and the District Court to this Effect are Not Clearly Erroneous.

The Court of Appeals in affirming the District Court found no sufficient basis for upsetting the finding below that it "would impose an impractical and unreasonable burden of formulation . . ." to require Carvel to limit itself to

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any necessary change were prescribed. If necessary, the chemical expert and a member of the advisory board were sent to make personal investigations. The water was chemically tested, the sanitation of the plant inspected, and the amount of carbonic acid gas being used checked.

[41] Ralston Purina Co. v. Saniwax Paper Co., 26 F. 2d 941 (W. D. Mich. 1928) (flour); Crown Fabrics Corp. v. American Viscose Corp., 145 F. 2d 246 (3d Cir. 1944) (rayon yarn); H. Freeman & Son, Inc. v. F. C. Huyck & Son, Inc., 7 F. Supp. 971 (N. D. N. Y. 1934) (wooden cloth); B. B. & R. Knight, Inc. v. W. L. Milner & Co., 283 Fed. 816 (N. D. Ohio 1922) (cotton piece goods).

advanced specifications of standards "... for all the various types of accessory products *used in connection with the mix* ..." (R. *453*). On this point, Chief Judge Lumbard dissents; he states "that the Carvel trademark presumptively generates sufficient economic power" (R. *442*), to make out a *prima facie* case (in his view) of illegal tying, albeit, rebuttable by Carvel. The evidence in rebuttal would have to be:

> "... proof that the specifications for products to substitute for those offered by Carvel would be so complex and detailed as to make it impracticable for Carvel to establish such specifications" (R. *444*).

He then cites *Engbrecht* v. *Dairy Queen Co.*, 203 F. Supp. 714 (D. Kan. 1962) which dismissed an action by a group of franchise dealers for a declatory judgment to establish that their franchise agreement was invalid because of violation of the antitrust laws. That case, while involving a similar product, distributed through a franchise system, differs from the instant case in material respects. The opinion refers to the filing of a pre-trial order whereby "this court has held *the mix is not a secret formula*", and indeed more than one mix was available to the dealers there (*supra*, 203 F. Supp. 714 at 717). There is nothing in the opinion which indicates that other essential ingredients were made by special formula. Nevertheless, Chief Judge Lumbard felt that *Engbrecht*:

> "... negates the proposition that it is logical and reasonable to infer—in the absence of proof more compelling than the mere self-serving statement of Carvel's own general manager—that it was reasonable and necessary for Carvel to embody a tying arrangement into its franchise agreement. *Dairy*

> *Queen* poses in striking contrast the insufficiency of the evidence adduced by Carvel to support its claim" (R. *445*).

By this *non sequitur*, due to the differences in essential materials and nature of the two businesses, Chief Judge Lumbard reached the crux of his dissent by stating (R. *446*):

> "I would think it best to remand the cause to the district court for a further hearing *limited to the issue of justification.* If Carvel could establish its claim the result ultimately would be the same. If Carvel were unable to do so the plaintiffs would have sufficiently established all the elements of an unlawful tying arrangement."

Judge Friendly writing for the majority, disagreed with and cogently refuted each point made in the dissenting opinion. We submit that there is substantial evidence in the record to support the concurrent findings; indeed the circumstances and evidence give no support to the views and inferences found in the minority opinion.

The *Dairy Queen* business in *Engbrecht* which operates a nation-wide chain of "some 3400 soft ice cream franchise stores" is "*not* quite similar to Carvel" (R. *445*) as the dissent assumes,—not only because of the vast difference in the number of stores and their geographic distribution on a nation-wide basis, but because mix, the chief ingredient, and perhaps the other ingredients as well, were not made in accordance with secret formulas. This is pointed out in the opinion of the Court of Appeals to support the inference that in *Engbrecht*, the franchising organization "*is satisfied with less exacting provisions*" (R. *454*).

Another statement in the dissenting opinion has tenuous, if any, support in the record, i.e.: ". . . the absence of proof more compelling than the mere self-serving statement of Carvel's own manager—that it was reasonable and necessary for Carvel to embody a tying arrangement into its franchise agreement" (R. *445*). This is characterization not borne out by the record. The witness, Vettel, was not testifying about embodying a tying arrangement. In this connection, it is important to note that the only Carvel dealer who testified at the antitrust trial was one of the petitioners, *Modick*, on a different question; that none of the other petitioners testified, and that plaintiffs did not call a single witness in their behalf to testify about ice cream supplies, whether they were mix, flavors or anything else, nor about uniformity or quality control. This was *their* choice. Whatever were the reasons which prompted petitioners to limit themselves to proof of *per se* violations of the antitrust law only by documentary evidence, the reasons were *theirs*. The point is that Carvel and the other respondents had a perfect right to rely, as all of them did, on petitioners' stipulation. The trial judge had occasion during the trial to point out to petitioners' counsel that they could have called any witnesses they pleased to prove their case:

> "The Court: You could have produced all the live witnesses you wanted. You, yourself said that was all the evidence you were going to put in."[42]

Under these circumstances, there was no proof whatever which made it incumbent upon Carvel to go forward and produce detailed evidence about economic justification for

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[42] This is at numbered page 3676 in the transcript of the trial brought to the Court.

not supplying or publishing specifications for its secret formula and standards. Vettel's testimony on the point of justification was actually elicited on *cross-examination* by petitioners' counsel, who did not avail himself of the opportunity for rebuttal. This leaves Vettel's testimony undisputed and uncontradicted. Isolated from surrounding circumstances, testimony by an employee favoring the side of his employer might be termed "self-serving". However, in the context of the surrounding circumstances when it is realized that petitioners' counsel, after eliciting the testimony on cross-examination, allowed it to remain unchallenged, the characterization "self-serving" loses validity. An important part of the testimony given by Vettel on cross-examination by petitioners' counsel on the subject of quality, standards and supervision, appears in the following excerpts:

> "Q. [*By Petitioners' Counsel*] Carvel contracts with suppliers other than mix suppliers to furnish to Carvel various ingredients and products that are used in the operation of the business; is that not so?
>
> "A. Yes, we do.
>
> "Q. And Carvel exacts from these suppliers a certain standard of quality?
>
> "A. We specify the standard of quality.
>
> "Q. Yes. Is that true with respect to every product that Carvel purchases or has produced by other suppliers for use in the Carvel stores?
>
> "A. Yes, I believe it is.
>
> "Q. And with respect to the standards that you specify, are they any different than the suppliers (*sic*, supplies) made by such suppliers for the non-Carvel trade?
>
> "A. Yes, they are.

"Q. This is to your knowledge?
"A. Yes, sir" (R. 203).

* * * * * *

"Q. [*By Petitioners' Counsel*] In any case, with reference to flavorings or toppings do you ever advise the store dealer of the Carvel specifications for these products?
"A. No, we do not.

"Q. Have you ever advised the Carvel store dealer that he can purchase those products from non-Carvel sources providing they meet Carvel specifications?
"A. No, we have not.

"Q. It is a fact, is it not, that Carvel does not permit that?
"A. *We don't permit it because it would be impossible to police it, impossible to control it, it would be impossible in any way to determine whether each of the hundreds of dealers were following those specifications*" (R. *41*).

The secrecy and difference of Carvel's special formulas which apply not only to mix but to all the essential ingredients of the end product were not in any way challenged by petitioners. Therefore it was unnecessary for Carvel to undertake to prove the injury to the business and its good will and prejudice to its rights in the secret processes which would result from making them available to any supplier in the market from whom a dealer happened to desire to make a purchase. Such widespread dissemination of standards and secret formulas would sooner than later lead to Carvel's loss of any exclusive rights to them. Exactly this kind of publicization of the confidential standards is what petitioners' counsel urge (Their Brief, p. 45). It is a procedure which we say in all fairness we do not

believe was contemplated by Chief Judge Lumbard in his dissent.

Carvel was not called upon to produce evidence of the harmful results from exposure of the private formulas and standards, when they were not challenged by petitioners. Nor was there any occasion to produce further testimony to embellish what Vettel stated on cross-examination, namely, that the disclosure of the standards would make it impossible to control or police the uniformity and quality either of the ingredients or the end products ". . . it would be impossible in any way to determine whether each of the hundreds of dealers were following those specifications" (R. 41).

Further proof in the record on this question demonstrates that certain products used in the preparation of Carvel's special formula fruit flavorings are specified by Carvel to be purchased at crop site (R. 197), a matter of which the Court of Appeals took note (R. *454*, fn. 4). The uniformity and quality achieved thereby in the purees and extracts made from these items is not a matter of fancy, but is required by the fact that an inferior ice cream product can result if non-conforming puree or extract is used to flavor it (R. 197-199). These ingredients specifications are related to wholesomeness of the finished product as well as to its taste and general quality (R. 198).

The burden which would be placed upon Carvel to ascertain that its specifications were being met is highlighted by the fact that Carvel's standards specified to its suppliers are different than those used by the suppliers for their non-Carvel trade. Accordingly, it would be incumbent upon Carvel to ascertain whether, in each instance, the supplier

chosen by any of 400 dealers to provide products conforming to these specifications, had purchased items with sufficiently similar qualities and compatibility with the other end product ingredients and had processed them correctly.

Another alternative open to Carvel would be the constant sampling and testing of flavorings purchased by each of the stores from the various sources they might have chosen.

To state these propositions is to make clear that the obligations they impose are impractical, would be highly burdensome and would require heavy expenditures of both manpower and capital, thus increasing what now are generally prices less than those prevailing in the trade for similar items.

It was in this connection, and recognizing the difficulties which both Carvel and the dealers would experience, that the Court below observed that cases where the formulation of specifications might be feasible were (R. *453*):

> " . . . scarcely relevant to the problem of controlling something so insusceptible of precise verbalization as the desired texture and taste of an ice cream cone or sundae; that Carvel was able to specify this to its source of supply, whose product it regularly checked, does not show that administration could be confided to 400 dealers."

The same may be said to even greater purpose on the question of Carvel's publication of specifications for its secret formula mix. Statistics in the record demonstrate that in the five state area during 1959 some 222,465,000 gallons of frozen desserts were produced (Def. Ex.

C-11). Ordinary experience supplemented by the contents of our Appendix "B", tells us that literally hundreds of dairies must be engaged in the manufacture of this quantity of mix in the region. If petitioners' argument were to prevail, Carvel would be compelled to verify and assure its standards of quality, uniformity and wholesomeness by repeated checks upon the output of as many of those plants with which its dealers might choose to deal. We have already shown that the ingredients permissible by federal standards for inclusion in ice cream mix allow wide latitude to a manufacturer of mix in selecting the sources of the various ingredients to be included therein (*supra*, at p. 20). Within these categories there exist products of varying source and quality. Manifestly, then, dairies called upon by one or several dealers to manufacture mix for their use to Carvel specifications would not find it economical to prepare a special mix sporadically for a few retailer customers, or to submit to the rigid conditions of supervision and preservation of the secrecy of the formula (R. 181, 182, 190, 191).

Under such circumstances it is evident that Carvel would be obligated to insure conformity with its standards as a practical matter by repeating in the case of many dairies, the same process by which it now controls the quality of its mix now made by a small number. We are referring to the requirement that dairies furnish reports as to each batch of mix within 24 hours of its manufacture with the final laboratory test of the product, the packaging and labeling of the mix; securing delivery of this perishable commodity; delivery by Carvel of its secret formula stabilizer-emulsifier, etc. (Pl. Ex. 10, R. 252-261, 3186; Pl. Ex. 15, R. 337, 338-339, 345, 3205; R. 196). The difficul-

tie under such conditions to maintain the secrecy of the formula are too great to be considered practical or feasible.

The commercial impossibility of the result for which petitioners contend brings to mind the observation of another court in a related context, that: " . . . the anti-trust laws do not require a business to cut its own throat." *Dehydrating Process Co.* v. *A. O. Smith Corp.*, 292 F. 2d 653, 657 (1st Cir. 1961).

In this light, we say the Court of Appeals, far from being clearly erroneous, was eminently right to distinguish machinery or equipment cases where publication of specifications could serve to protect a vendor's good will and responsively answer the contention that a tying requirement is necessary for the purpose (R. *453*).

On this aspect of the case we invite consideration to analogous circumstances in *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1943). In that case, *Bausch & Lomb* made pink tinted optical lenses exclusively for Soft-Lite, which distributed them through a network of franchised wholesalers and franchised retailers. Soft-Lite appealed from a decree adjudging its pricing policies illegal. Soft-Lite sold one-third of the pink tinted lenses for one-half of the gross receipts derived in the United States by everybody engaged in the sale of such lenses (321 U.S. at 710). Soft-Lite distributed under a trade-mark, but no patents *or secret processes* were involved (*id.*). The government cross-appealed to obtain an expansion of the decree, and it is this feature of the case which is pertinent here. The opinion of this Court stated (*id.* at 728):

> "Specifically, we are asked to direct the inclusion of requirements that Soft-Lite file 'with the district court a written instrument providing that it will sell its product, without discrimination, to any person offering to pay cash therefor' ".

This specific request of the Government was rejected as contrary to the intentions of Congress even with respect to someone who had violated the law. This Court said:

> "But in no instance has it [Congress] indicated an intention to interfere with ordinary commercial practices. In a business, such as Soft-Lite, which deals in a specialty of a luxury or near-luxury character, the right to select its customers may well be the most essential factor in the maintenance of the highest standards of service" (*id.*).

In the Carvel business the dealer is important but the trademark and good will of the enterprise is at his mercy if he is free to experiment let alone tamper with the product. Product integrity, correspondingly, is of great importance to the dealer's welfare. It is for the benefit of all the franchised dealers as well as the franchising organization that quality control should remain in the hands of the licensor—where it belongs, by law and common sense.

We submit on behalf of Carvel in the context of concurrent findings by two courts below dismissing charges of unlawfulness levelled by petitioners that to compel Carvel to publish its formulas and specifications, which in this case are trade secrets, would be unprecedented, not supported by any authority which has been called to our attention or of which we are aware, and would represent an unwarranted interference with a lawful distribution system of a high quality trademarked product. We submit

further that the courts below far from being clearly in error were entirely correct on the facts to find that Carvel has adequately proven its justification for invoking, and by supervision, enforcing conditions for control of quality and uniformity of the products under its trademark, and that its true purpose thereby was the protection of the trademarks and good will of the business within the meaning of the statement found in *United States* v. *Standard Oil Co.*, 337 U.S. 293 (1949):

> "The only situation, indeed, in which the protection of good will may necessitate the use of tying clauses is where specifications for a substitute would be so detailed that they could not practicably be supplied" (*id.* at 306).

IV.

The Courts below correctly found and decided that neither the Carvel agreements with its suppliers nor its total requirements and exclusive dealing agreements with its franchised dealers were illegal under the Sherman or Clayton Acts.

A. The Carvel Franchise Agreements with Its Dealers Were Correctly Found Not to Embody Violations of the Antitrust Laws.

Petitioners at the trial, before the Court of Appeals and in this Court rely on *per se* unlawfulness of the franchise agreement. Concurrent findings reject their contention and more than that, uphold the legality of the total requirement and exclusive dealing provisions. They were found to be economically justified, and responsive also to the quality control and supervision of dealers, as required and sanctioned by the law of trademarks (R. *447, 448; 49, 50*). These

conclusions are supported by the entire record; it is abundantly clear that no clear error has or can be shown.

Petitioners failed to produce economic evidence of any kind. They rested from start to finish on the doctrine of unlawfulness *per se*.

(1) It seems clear that total requirement agreements are examined as to whether they effect an unreasonable restraint on commerce under standards summarized in *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1960); to the same effect are *Lawlor* v. *National Screen Service Corp.*, 352 U.S. 992 (1957), *aff'g.* 238 F. 2d 59 (3d Cir. 1956), and *FTC* v. *Sinclair Co.*, 261 U.S. 463 (1922).

(2) The lawfulness of exclusive dealing provisions as reflected in the Carvel franchise agreements is ascertained not by the *per se* rule but under the standards of reasonableness. *Tampa, supra*; *Pick Manufacturing Co.* v. *General Motors Corp.*, 299 U.S. 3 (1936) affirming 80 F. 2d 641 (7th Cir. 1935); *Bascom Launder Corp.* v. *Telecoin Corp.*, 204 F. 2d 331 (2d Cir. 1953), *cert. den.* 345 U.S. 994; *Boro Hall Corporation* v. *General Motors Corporation*, 124 F. 2d 822, (2d Cir. 1942); *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 135 F. Supp. 4 (D. Col.) *rev'd.* (4th Cir.), 343 F. 2d 418, 420, 421, *cert. den.* 355 U.S. 822 (1957); *Schwing Motor Co.* v. *Hudson Sales Co.*, 138 F. Supp. 899 (D. Md.) aff'd. *per curiam* 239 F. 2d 176 (4th Cir. 1956), *cert. den.* 355 U.S. 823 (1957); and *Hudson Sales Corp.* v. *Waldrip*, 211 F. 2d 268 (5th Cir. 1954), *cert. den.* 348 U.S. 821.

It has been pointed out that restraints applicable to a relatively minor brand in a competitive market of a general commodity are not encroachments upon the antitrust stat-

utes at all. *Tampa Electric, supra; Packard Motor Car Co., supra; Schwing Motor Co., supra; Reliable Volkswagon, supra; Arthur* v. *Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824 at 827, 829 (D. Md. 1937).

3. Other Carvel dealer agreements ancillary to the franchise agreements are also not unlawful.

The remaining agreements which the dealer signs at the time he acquires his franchise are essentially supplementary to the franchise agreement. Thus, the "Signs and Special Equipment Lease" gives the dealer the right to use certain unique Carvel signs and the front freezer plate for a nominal annual rental so long as the dealer complies with the franchise (Pl. Ex. 6, R. 242, 3157); the land lease, the "Conditional Reassignment of Lease" and the "Assignment of Lease and Assumption Agreement" all condition the rental of the land upon which the Carvel store is located upon the faithful compliance of the dealer with the terms of the franchise agreement and provide, in substance, that Carvel is entitled to step into the dealer's position as lessee, as part of the relief, if there is any substantial breach of the franchise (Pl. Ex. 7, R. 245, 3162; Pl. Ex. 7A, R. 250, 3162).

To apply the *per se* rule to total requirement or exclusive dealing contracts has been held reversible error. *Telecoin, supra; Lawlor* v. *National Screen Service Corporation*, 238 F. 2d 59 (3d Cir. 1956). This Court affirmed, 352 U.S. 992 (1957) the holding that ". . . exclusive agreements are not *per se* violation of the antitrust laws and are permitted in circumstances where the facts disclose a course of conduct and reasonableness of action not prohibited by the antitrust laws" (*supra*, 238 F. 2d 59 at 65).

After retrial on the merits, the treble damage suit was dismissed against all defendants. On further appeal, this was affirmed, *supra*, 270 F. 2d 146, 152-156 (3d Cir. 1959), *cert. den.* 362 U.S. 922 (1960).

Denison Mattress Factory v. *Spring-Air Company*, 308 F. 2d 403 (5th Cir. 1962), relying upon *Telecoin Corp.*, *supra*, applied the rule of reason and not the *per se* rule to uphold the exclusive dealing provisions of a franchise system similar to the one involved in this case (*supra*, 308 F. 2d 403 at 408, 409).

In *Pick*, *supra*, the Circuit Court affirmed dismissal of the complaint alleging violation of the Clayton Act. It is particularly in point on the question of whether Carvel may by contract insist that its dealers buy only Carvel ingredients. In that case, *Pick Manufacturing* in the business of manufacturing and selling replacement parts for various makes of automobiles complained that the dealer contracts by Chevrolet and Buick compelled them to sell exclusively only "new Chevrolet [or Buick] parts or accessories at not more than the current list prices issued by seller," and conversely provided that they could not sell or use any parts "not manufactured by or authorized by the Chevrolet Motor Company, a division of General Motors Corporation".

The Courts found that the restrictions to use Chevrolet parts on Chevrolet cars and Buick parts on Buick cars were "reasonable and necessary" to protect the business of the manufacturers and also the buying public (*id.* at 642). It also pointed out that this was not a horizontal arrangement between competitors, but a vertical one between a manufacturer and his dealer (*id.* at 643), and in the automobile business was particularly appropriate in view of

the manufacturer's contingent liability as a warrantor. This last reason is in essence equally applicable to Carvel as to a manufacturer's warranty of freedom from defects.

It seems fair to say that petitioners rather strenuously avoided the explicit guide lines laid down by this Court in *Tampa, supra,* which are directly applicable to all of the antitrust questions concerning the exclusive dealing and total requirement aspects of the Carvel franchise agreement. We are referring to the three principal rules stated in *Tampa,* 365 U.S. 320 at 327-328, (in summary):

> "*First,* the line of commerce . . . must be determined . . . *Second,* each area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practically turn for supplies . . . *Third,* and last, the competition foreclosed by the contract must be found to constitute a substantial share of the market."[43]

In fact, petitioners seem aggrieved that this Court in *Tampa* added a gloss by exposition and classification to the reasoning in *United States* v. *Standard Oil, supra* (Their Brief, pp. 30-31). It is not, we trust, inappropriate to suggest that the deficiency in petitioners' proof responsive to the standards stated in *Tampa, supra,* is hardly attributable to lack of zeal. Petitioners' failure to so much as attempt

[43] "To determine substantiality in a given case, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein. It follows that a mere showing that the contract itself involves a substantial number of dollars is ordinarily of little consequence" (365 U.S. at 329).

to introduce proof of economic data may be due in part, as Judge Friendly states, to the indicated triviality of their damage as compared with the cost of assembling market data (R. 455). However, in the light of all the circumstances of the entire case from its beginning and the record before this Court, we feel justified to suggest that petitioners advisedly saved their money and effort in the gathering of market data because they discerned their inability to produce anything of value to their case.

Carvel on the other hand produced records of their yearly sales from 1953 to 1960 of ice cream mix to all Carvel outlets in the states of Connecticut, Massachusetts, Pennsylvania, New Jersey and New York (Def. Ex. C-9, R. 315, 3490). A compilation of the official records for the same period of production in each one of those states of frozen dairy products as compared with the total sales by Carvel, shows in each of the eight years from 1953 to 1960 that Carvel's share was less than 1/8 of 1% in the State of Pennsylvania, less than 1% in each of those years in the States of Massachusetts and Connecticut; and that the highest relative share of business is found in the two states of New Jersey and New York. Even that is under 2%; with a mean of about 1½% (Def. Ex. C-12, R. 318, 3501).

Another chart shows that of the approximate 200,000,000 gallons representing the production of manufactured dairy products in the five states just mentioned, Carvel's share never exceeded even 1% in any one of those years (Defs. Ex. C-11, R. 317, 3500).

Consequently despite petitioners' reliance on *per se* by their self-limiting stipulation, substantial evidence supports the concurrent findings by the courts below that under the "rule of reason" unlawfulness was not shown.

B. Carvel's Agreements with Essential Ingredient Suppliers (Respondents) Were Correctly Held Not to Be Unlawful.

The supply contracts with those companies manufacturing Carvel ingredients for it are perfectly proper and in no way constitute violations of the antitrust laws, particularly *per se* violations. The District Court found that "these contracts were not shown to be in any way illegal, still less illegal *per se*" (Record *52, 53*). The Court of Appeals unanimously affirmed the District Court (449). There was no reliance on conspiracy except as the written documents might themselves disclose. It was found that no such conspiracy existed (R. *51*).

We submit that the finding of the District Court as affirmed by the Court of Appeals with respect to the agreements between Carvel and its suppliers was justified. In analyzing the contracts they must be divided into two categories. First, there are the contracts Carvel has with the dairies which produced the Carvel special formula mix (Pl. Ex. 10, R. 252, 3186; Pl. Ex. 15, R. 337, 3205). These agreements provide that each dairy agrees to manufacture and sell to Carvel all the Carvel mix required by Carvel for sale to its franchisees in prescribed geographic areas. Carvel in turn agrees to purchase from the dairies all of its requirements of Carvel mix for such stores. The supply contracts further provide that the dairies agree to "deliver only Carvel mix to Carvel stores and no other ice cream mix or ice cream preparation of any kind" (R. *51-52*).

We submit that the agreements are perfectly proper exclusive total requirements contracts and that the contractual provisions prohibiting the delivery of other than Carvel mix to the stores was necessary in the public interest to

protect against the possibility of a palming off of any mix other than Carvel special formula mix to the individual Carvel franchisees.

As to the second category of supplier contracts represented by Carvel's contract with Eagle Cone (Pl. Ex. 11, R. 264, 3187), here the only restriction was that cones made pursuant to the design submitted by Carvel would be made only for Carvel. There was no restriction whatsoever in this agreement prohibiting dealings between the cone manufacturer and anyone else, including Carvel franchisees, with respect to the purchase and sale of ice cream cones other than those made in conformity with the special Carvel design.[44]

We submit that both categories of supplier contracts were clearly proper under well established authority. They certainly could not by any stretch of the imagination be construed as "*per se*" violations. *Tampa Electric Co.* v. *National Coal Co.*, 365 U.S. 320 (1960); *U.S.* v. *Columbia Steel*, 334 U.S. 495 (1948); *Rascom Launder Corp.* v. *Telecoin Corp.*, 204 F. 2d 331 (2d Cir. 1953), *cert. denied*, 345 U.S. 994.

V.

There was no error in the unanimous affirmance by the Court of Appeals of the Trial Judge's finding of no convincing proof of price fixing.

Petitioners do not really attempt to show any fundamental error of law by either of the lower courts with

[44] Judge Lumbard was mistaken in stating that there was a provision in the contracts between Eagle and Mohawk, prohibiting these suppliers from selling non-Carvel products to the individual dealers (R. 449).

respect to the price fixing question. On the contrary, they ask this Court to review for the third time, evidence already carefully reviewed by the two lower courts, with the hope that this Court will draw a different conclusion from the evidence than that unanimously reached by both lower courts.

We submit that there is no justification for doing so, and that abundant evidence before the trial court, which petitioners ignore, clearly demonstrates that the trial court correctly found that while Carvel admittedly set forth suggested prices which the individual franchisees could use as guides if they so chose, it was nevertheless clear that they were free to charge any price which they wished for their products and that at no time were they compelled by Carvel to charge prices fixed and determined by Carvel.

A. The Findings by the Courts Below.

> "There was no evidence that after February 27, 1956 Carvel imposed on any of the franchise operators any duty to maintain given prices. In fact in this later period Carvel prepared advertising signs and posters in which prices were left blank, or on which stickers could be pasted with various prices selected by the operators. * * * One of the plaintiffs' own items of evidence, a letter from Carvel dated September 3, 1957, which went out to all operators stated: 'Our supply department has blank signs to use should you care to increase or decrease your prices.'
>
> "There is no convincing evidence that the dealers do not presently have the right to fix their own sale prices to the public without penalty by Carvel. In the absence of any attempt by Carvel to impose a binding price structure, the fact that Carvel an-

nounced a schedule of suggested prices is not illegal" (R. *66-67*).

The Court of Appeals unanimously affirmed the finding of the District Court that there was no illegal price fixing, stating:

> "It is not the duty of this court to consider *de novo* the conflicting evidence and resolve this factual issue; rather, we must review the determination of the district court to determine whether or not it is clearly erroneous. See *Ruby* v. *American Airlines, Inc.*, 2nd Cir., Docket No. 28473, February 14, 1964, pp. 998-1002; *United States* v. *National Ass'n of Real Estate Boards*, 339 U.S. 485, 494-96 (1950). There is much evidence to support Judge Dawson's finding of fact that Carvel did not engage in an unlawful price-fixing scheme, and we cannot say that Judge Dawson's conclusion was clearly erroneous" (436-437).

B. The Limited Policy After 1955: Merely to Recommend Prices.

The relevant provision of the franchise agreement reads:

> "EIGHTH: The Dealer shall have the right to sell Carvel's Frozen Dairy Product and/or other items authorized for sale by him under the terms of this agreement *at any price that the dealer determines. Wherever Carvel recommends a retail price, such recommendation is based upon Carvel's experience concerning all factors that enter into a proper price, but such recommendation is in no manner binding upon the dealer*" (Pl. Ex. 1, R. 208, 212).

Individual franchisees were further advised that they were free to charge any price they wanted. In clear and explicit language Carvel's letter of February 27, 1956 addressed to each franchisee (in pertinent part), stated:

> "All references in your agreement and/or the Standard Operating Procedure Manual to the retail prices of Carvel's Frozen Dairy Product, in its various forms, are deemed to be references to recommended prices only. These prices are based upon your company's considerable experience, and the sincere conviction that the price so recommended is both acceptable to the public, and profitable for your operation. *However, you are entirely at liberty to vary these prices if you so desire,* and we disclaim any intention to control your prices" (Def. Ex. C-1B, R. 283-284, 3514).

In addition, specific correspondence between Carvel and its franchisees, including some of the petitioners herein, further showed Carvel's policy to limit itself to suggestions.

Thus on September 3, 1957, Carvel sent a letter to all Carvel franchisees advising that:

> "Our supply department has blank signs which may be used should you care to increase or decrease your prices" (Pl. Ex. 27, R. 274, 3259).

On October 10, 1957, Carvel wrote to the owner of Carvel Store #153 and advised him:

> "With regard to your request for permission to sell 3 pints of Carvel ice cream for $1. . . . *The final determination of any selling price at the customer level must be that of the store owner. The decision with regard to your request would therefore be yours*" (Def. Ex. C-3, R. 285, 290, 3522).

Under date of September 5, 1958, James Pierce, one of the petitioners herein, wrote to Carvel:

> "I would like to know if you have the signs that advertise the items and give the prices of them such

as the Take Home menu, made up without the prices on them . . .

"If you haven't any, could you have a few made up for me. If I can't get them I will have to put up my own signs with the new prices" (Def. Ex. C-3, R. 285, 286-287, 3522).

Carvel answered on September 8th:

"In reply to your recent request, please be advised that we do not have signs for Daily Features without recommended prices; however we do have price change stickers, which are available through the Order Department" (Pl. Ex. 43, R. 276, 3284; Def. Ex. C-3, R. 285, 288, 3522).

Seu, another of the petitioners herein, was advised by Carvel:

"With regard to your questions concerning prices, these questions would have to be resolved by you as the store dealer, since any determination of price with regard to the merchandise which you sell would have to be made by you and could not be made by this organization" (Def. Ex. C-3, R. 285, 289, 3522).

Under date of June 7, 1957, Carvel wrote to still another petitioner herein, Paul Giberman, on the subject of retail prices, saying:

"You also mention in your letter that you would like to have a large sign made advertising Papapaloozas at 7 for a $1.00. You, of course, realize that the Carvel organization can in no way control the price of any Carvel item which you offer to our customers. *The price for which you sell the item must be determined by you. Carvel can only recommend*

a fair price which shows you a fair profit on the item. However, we do require that the items be made according to the recipe as contained in your S.O.P. So long as the weights and products are as outlined in the recipes, the store owner's obligation to Carvel has been fulfilled" (*id.* at 285).

C. The Right to Decide Prices Was Understood and Exercised.

The evidence shows that after 1955 the determination of retail prices was a matter within the discretion of each franchisee. They exercised this right during the operation of their Carvel stores (R. 166-167; Pl. Ex. 43, R. 276, 3284; Def. Ex. C-1B, R. 283-284, 3514; Def. Ex. C-3, R. 285-294, 3522).

Since 1955, Carvel has also consistently explained to those *consumers* who write in to inquire why prices for the same Carvel items vary *from store to store,* that each franchisee is free to charge any price he wants and Carvel cannot and does not control the retail prices charged by the individual franchisee (Def. Ex. C-3, R. 291-294, 3522).

In addition to documentary proof, there was confirmatory oral testimony by Mr. Vettel, Carvel's General Manager. He gave uncontradicted testimony that after 1955 Carvel supplied the individual franchisees with posters having blank places for insertion by them of prices for each product, or selection of a desired price sticker which could be pasted into the blanks (R. 162-163; Def. Exs. C-16, C-17, 3517).[45] The franchisee could order price change stickers for any price he might desire (R. 162-163; Def. Exs. C-14, 3515; C-15, 3516).

[45] These Exhibits have been delivered to the Court.

Even Lester Modick, the one and only petitioner who testified, gave reluctant corroboration that the franchisees were free to charge whatever prices they wanted; he admitted that he received a blank sign from Carvel with the Carvel name affixed and without any prices printed thereon (R. 205); also that he sold a 15¢ cone, though the Carvel recommended prices for cones were 10¢ and 20¢, and on another occasion Mr. Modick charged a customer 50¢ for an ice cream cone in the presence of a Carvel supervisor (R. 206).

Significantly, while each of the petitioners had testified at length several months earlier in support of their claims for relief based upon allegations of fraud and deceit against the Carvel defendants, not a single one, including Modick, testified in the antitrust actions that Carvel compelled them to follow prices fixed and determined by Carvel.

D. The Trial Court's Finding that There Was No Convincing Proof of Price Fixing and the Court of Appeals' Unanimous Affirmance Thereof, Are in No Way Shown to Be Erroneous by the Isolated and Out of Context Excerpts Upon Which Petitioners Rely.

Petitioners rely heavily (Their Brief, p. 54) on Plaintiffs' Exhibits 40 (R. 379, 3281) and 42 (R. 275, 3283). Exhibit 40 is purportedly a letter from Carvel to the Gibermans advising them in part that, "only 10 and 20¢ cones are prescribed in the S.O.P." and that, "no one could make any criticism" if Giberman exceeded the minimum requirements of the S.O.P. Exhibit 42 purports to show that Giberman needed Carvel's permission to run sales. These excerpts extracted from two letters, cannot outweigh all the other proof of no price fixing, particularly

when these extracts are considered in proper context. Petitioners fail to mention that in the first paragraph of Exhibit 42 Carvel actually encourages sales upon the dealer's own initiative. Nor do they refer to the letter a few days later, on June 7, 1957, from Carvel to Giberman advising him that:

> ". . . you, of course, realize that the Carvel organization can in no way control the price of any Carvel item which you offer to our customers. *The price for which you sell the item must be determined by you*" (Def. Ex. C-3, R. 285, 3522).

Totally ignored by petitioners is the general letter circulated to all franchisees (including Giberman) that all prices are merely recommended prices which can be disregarded and that price change stickers were available (e.g., Pl. Ex. C-1B, R. 283-284, 3514; Pl. Ex. 27, R. 274, 3259). Equally conspicuous is the absence of testimony by any petitioner or other franchisee that they were required to, or in fact adhered to any price schedule emanating from Carvel for any reason whatsoever, or were inhibited from running sales as they desired.

Petitioners' dependence (Their Brief, p. 54) upon the phrase "Standard selling price" found on pages 16, 24, 41, 42, 44 and 48 of the post-1955 S.O.P. (Ex. 8A) is equally absurd. First, whether the prices in the post-1955 S.O.P. were labelled as "Standard" or "Recommended" was completely irrelevant in view of the text of paragraph "Eighth" of the Dealer's Franchise Agreement (Pl. Ex. 1, R. 208, 212, 3148) which clearly stated that all prices suggested by Carvel were in no way binding on the franchisee; also the supplemental letter of February 27, 1956

(Pl. Ex. C-1B, R. 283, 3514) addressed to all dealers informed them:

> ". . . all references in your . . . Standard Operating Procedure Manual to the retail prices of Carvel's Frozen Dairy Product, in its various forms, are deemed to be references to *recommended* prices only." (Emphasis in original.)

Though this should be dispositive, it should be noted that petitioners' brief is less than candid in neglecting to mention that the word "recommended" precedes the suggested price for the consumer items described at each of the following pages of § J of Exhibit 8A: 16, 16A, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 76S, 77S, 78S.

Mere reference by petitioners to the appearance of the phrase "Standard selling price" on certain pages of the post-1955 S.O.P., is misleading and inaccurate. To appreciate this, it is necessary to note that Exhibit 8A is not the post-1955 S.O.P., as it existed at any particular point in time during 1955 or thereafter. It is actually a composite of the S.O.P. as issued in 1955 together with subsequent substitute pages issued by Carvel from time to time thereafter. Thus in Exhibit 8A, Section J, there are actually two pages "16". The first page "16" is for "thick shakes" and next to the price set forth on that page is the phrase "recommended selling price"; immediately thereafter is another page "16" for a product known as "pre-pack tarts" to which appellants refer and which does bear the phrase "standard selling price". However, if one looks at the only page "46" in Section J, the identical

item—"pre-pack tarts"—is there described, with the phrase "recommended selling price" preceding the price set forth on that page. It is thus apparent that the page "16" of the post-1955 S.O.P. setting forth a "standard selling price" for "pre-pack tarts" was superseded at an early date by page "46" setting forth a recommended selling price for the same item.

The same holds true of the remaining pages which petitioners mention as having the phrase "standard selling price" placed next to the suggested price, i.e. pages "24", "41", "42", "44" and "48". Thus, for example, there are two pages "24" in Section J of Exhibit 8A. The first page "24" is for the "Carvel Chocolate Cocoanut Sundae" and bears the phrase "recommended selling price". Immediately thereafter, is another page "24" for the "Carvel Short Cake" that does bear the phrase, "standard selling price". However, that page was apparently superseded at an early date by page "43" of Section J, Exhibit 8A, which is also for the "Carvel Short Cake" and which bears the phrase "recommended selling price".

Petitioners attempt to impeach the credibility of Mr. Vettel by now arguing that he had been untruthful when he testified at the trial in 1962, that Carvel had not used the term "Standard Prices" for "at least four to six years" (Their Brief, p. 54). A careful examination of Section J of the S.O.P. shows that Mr. Vettel's testimony was completely truthful. See e.g. Ex. 8A, Section J, page "8" dated December 5, 1957, page "19" dated November 25, 1957, page "22" dated November 26, 1957, all bearing the phrase "recommended selling price".

Petitioners quote from Plaintiffs' Exhibit 25 (R. 359, 3254-5), a Bulletin dated August 18, 1954, and not germane

to the post-1955 franchise (Their Brief, p. 55). They use this to show that the dealer is not permitted to conduct special sales without first having received permission from Carvel (*id.*). It should be noted that under the post-1955 S.O.P. it was not made mandatory that the individual dealer clear special sales with Carvel but that this was merely "suggested"; this was made clear by the following testimony given by Mr. Vettel:

> "Q. Isn't it true that a store owner after the change in price policy in 1955 still had to obtain permission from Carvel to run a reduced-price sale? A. No. We asked that they contact us if they were going to run a reduced-price sale so that we could advise the other store owners in the neighborhood and all participate in the same sale.
>
> "Q. But he didn't have to come to Carvel for permission? A. No, sir" (R. 167).

The purpose of so advising other franchisees in the area is conceded by petitioners to be: "so that they might have an opportunity to participate therein" (Their Brief, p. 55). Obviously this includes the franchisee's choice not to have a sale.

Petitioners rely on Plaintiffs' Exhibit 39 (3280), which is a selection by petitioners of some, but not all, of the approved advertising material made available by Carvel (Their Brief, p. 55). They ignore other approved Carvel advertising material made available to the individual franchisee which contained blank spaces for prices where the franchisee could write in, or paste on whatever price he wanted (R. 162-163, 166; Def. Exs. C-16, C-17,[46] 3517; Def.

[46] Def. Exs. C-15, C-16, C-17 have been brought to this Court.

Ex. C-3, R. 285, 286-288, 3522; Pl. Ex. 27, R. 274, 3284; Pl. Ex. 43, R. 276, 3259).[47]

Retitioners' conclusion (Their Brief, p. 55) that franchisees would be denied cooperative advertising credits unless they advertised their products at Carvel recommended prices is outrageous because there is not an iota of evidence to support this inference. There was no testimony even suggesting this from any petitioner or other source. The fact that Plaintiffs' Ex. 89, the Carvel Daily Feature Calendar for July 1959, contains Carvel recommended prices, does not help to prove that the individual franchisees, and in particular the petitioners herein, were under even the slightest compulsion to follow these suggested prices. Further corroboration of the complete lack of compulsion upon franchisees is demonstrated by the fact that the covering letter sent with the Daily Feature Calendar for the month of July (Ex. 89) in discussing the contents of said Calendar, refers to said contents as "the *recommendations* of the calendar for the month of July" (Pl. Ex. 89, R. 418, 3641).

Petitioners' attack on the Carvel board of governors as an instrument of allegedly unlawful price fixing is also without justification. The uncontradicted testimony of Vettel, the Carvel organization's General Manager since 1955 (R. 158) was to the effect that it was a medium for discussion and exchange of information (R. 171-173). There is certainly no showing that it was used to compel anyone, par-

[47] As to those posters on which prices were already printed, Carvel made available price change stickers for whatever prices the franchisee requested (R. 162, Def. Ex. C-15; Pl. Ex. 43, R. 276; Def. Ex. C-3, R. 285, 286-288). We have already shown that when a special sign was preferred to a price change sticker, Carvel quickly gave permission to Giberman to have his own sign made up (Def. Ex. C-3, R. 285).

ticularly petitioners, to follow a fixed and determined schedule of prices.

We submit that petitioners have utterly failed to show any error in the trial court's finding, as unanimously affirmed by the Second Circuit, that there was no convincing proof of any attempt by Carvel to impose a binding price structure on the franchisees.

E. The Courts Below Were Not Clearly in Error in Finding No Illegal Price-Fixing.

The findings justified the statement in the opinion of the District Court:

> "In the absence of any attempt by Carvel to impose a binding price structure, the fact that Carvel announced a schedule of prices is not illegal. See *Maple Flooring Mfrs. Assn.* v. *United States*, 268 U.S. 563 (1925); *Cement Mfrs. Assn.* v. *United States*, 286 U.S. 588 (1925)" (R. 67).

Denison Mattress Factory v. *Spring-Air Co.*, 308 F. 2d 403 (5th Cir. 1962) in a closely similar situation affirmed the trial court's finding "that there was no price fixing in this case" (*id.* at 412). *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927) was cited and applied. The trial court in *Denison* disregarded telegrams indicating price fixing. The court, upon evaluation of the evidence as a whole preferred to rely on proof that dealers' prices differed and that what the franchisor had done "was not effective to control or fix prices" (*id.*). Since the trial court's decision was supported by substantial evidence it was affirmed with this language: "Whether the appellate court agrees with the choice made is not the question on

appeal" (*id.*). This Court, we submit, should not de novo weigh the evidence, pass on credibility or draw its own inferences, which is really what petitioners here are requesting when the two lower courts, after careful review, have already twice rejected the inferences petitioners contend should be drawn from the evidence. See *Scott* v. *Spanjer Bros., Inc.*, 298 F. 2d 928 (2d Cir. 1962) at 932; *Ideal Toy Corp.* v. *Sayco Doll Corp.*, 302 F. 2d 623 (2d Cir. 1962) at 624.

The Court of Appeals found "much evidence to support Judge Dawson's finding of fact that Carvel did not engage in an unlawful price fixing scheme" (R. 437), and affirmed unanimously. We submit that no showing whatever has been made of clear error.

F. Petitioners' Price Fixing Allegations Relate Solely to Products Manufactured and Sold Exclusively in Intrastate Commerce and Therefore Could Not Constitute a Violation of the Federal Antitrust Laws.

We submit that a further ground which requires affirmance of the trial court's finding denying liability based upon petitioners' price fixing allegations, is that it is clear from the record below that such price fixing allegations relate solely to products manufactured and sold exclusively in intrastate commerce. Hence there is no jurisdictional basis for invoking the federal antitrust laws.[48]

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[48] At page 53 of their brief, petitioners make the statement that Carvel did not appeal from the ruling of the trial judge adverse to Carvel relating to the pre-1955 franchise which Susser, McCoy, Frederick and Mueller had entered into. However, no appeal could have been taken by Carvel in these cases as no final judgment *as to Carvel* was entered or directed to be entered as to the actions brought by these plaintiffs; see footnote at page 4, *supra*.

In order to prevail on their allegations of price fixing, petitioners had the burden of showing not only the fact of price fixing restraints but also that the articles which were the subjects of the price fixing restraints were themselves in interstate commerce, or that restraints on intrastate transactions had a direct and substantial adverse effect upon the interstate commerce in the articles affected. *Brosious* v. *Pepsi Cola Co.*, 155 F. 2d 99 (3d Cir. 1946); *Tobman* v. *Cottage Woodcraft Shop*, 194 F. Supp. 83 (S.D. Cal. 1961).

As has already been mentioned, the various raw ingredients supplied to the individual dealer come to rest at his Carvel store. After these ingredients are supplied to, and come to rest at the store the individual dealer then utilizes these ingredients to manufacture his various ice cream products on the store premises. These manufactured ice cream products are a completely new product when compared with the ingredients supplied to the individual dealer for the manufacture of said products (R. 149). These products are then sold by the dealer at retail to customers who are the immediate consumers of the manufactured Carvel ice cream products. Thus the manufactured Carvel ice cream products made by the individual franchisee are not intended to, and in fact do not re-enter the flow of interstate commerce at any time. The essential jurisdictional prerequisite of being in or having a substantial effect upon interstate commerce is therefore not satisfied. The federal antitrust laws cannot be successfully invoked by petitioners in support of their price fixing allegations without such a showing. *Brosious* v. *Pepsi Cola Co.*, 155 F. 2d 99 (3d Cir. 1946); *Atlantic Co.* v. *Citizens Ice & Cold Storage Co.*,

178 F. 2d 453 (5th Cir. 1949), *cert. den.*, 339 U.S. 952; *Ewing-Von Allmen Dairy Co.* v. *C and C Ice Cream Co.*, 109 F. 2d 898 (6th Cir. 1940), *cert. den.* 321 U.S. 689 (1941); *Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.*, 184 F. Supp. 312 (N.D. Ill. 1960), *aff'd* 287 F. 2d 265 (7th Cir.), *cert. den.*, 368 U.S. 829 (1961); *Tobman* v. *Cottage Woodcraft Shop*, 194 F. Supp. 83 (S.D. Cal. 1961).

It is not disputed that some of the individual franchisees may have stores located on main highways (though no such showing was made at trial) and that they may therefore be patronized by passing out-of-state customers. Yet this possibility would not be sufficient to bring the individual franchisee's retail operations within the jurisdictional prerequisite of being in, or affecting, interstate commerce. *Elizabeth Hospital, Inc.* v. *Richardson*, 269 F. 2d 167 (8th Cir. 1959), *cert den.*, 361 U.S. 884; *Atlantic Co.* v. *Citizens Ice & Cold Storage Co., supra.*

Nor would the fact that segments of the business of Carvel might be in interstate commerce, affect the fact that the manufacture and sale of the ice cream product by the local franchisee is a separate and purely intrastate operation not affecting interstate commerce and not within the jurisdiction conferred by the commerce clause. *Foster & Kleiser Co.* v. *Special Site Sign Co.*, 85 F. 2d 742 (9th Cir. 1936), *cert. den.* 299 U.S. [illegible] (1937); *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947) at 233-234.

The trial court's opinion did not make a finding of fact contrary to our contention that the individual franchisee is engaged exclusively in intrastate commerce in manufacturing and selling Carvel's varied ice cream products. However, the trial court's opinion rejected our contention that

petitioners had failed to make the necessary showing of federal jurisdiction in these words:

> "Whatever might be the validity of the defendants' argument if the restrictions involved were imposed on an isolated dealer, it is clear that where they form part of Carvel's general policy of conducting its business, interstate commerce is so affected as to give this Court jurisdiction. The restrictions pertain not merely to the way in which the plaintiffs conduct their business but also to the way in which Carvel conducts its business. In this light it is obvious that the requisite effect on interstate commerce is present. See *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U.S. 533, 568-69 (1939); *United States* v. *Standard Oil Co.*, 78 F. Supp. 850, 864-5 (S.D. Cal. 1948), *aff'd.* 337 U.S. 293 (1949)" (R. *68*).[49]

We respectfully submit that, at least as to petitioners' price fixing allegations, the trial court erred in holding on the basis of the above quoted reasoning that petitioners had established the necessary jurisdictional showing. We further contend that neither *United States* v. *Rock Royal Co-Operative*, *supra*, nor *United States* v. *Standard Oil Co.*, *supra*, are in point. In *Rock Royal Co-Operative*, the constitutionality of an order issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937, was challenged. It regulated the handling of milk in the New York Metropolitan area and provided

[49] The Court of Appeals, though noting our argument, found it unnecessary to pass upon it, in view of the fact that they unanimously affirmed the District Court's finding that, in fact the franchisees were *not* compelled to follow retail prices fixed and determined by Carvel (R. *437*, footnote 3).

inter alia for regulation "of the price to be paid upon the sale by a dairy farmer who delivers his milk to some country plant".

The Court described and answered in part the argument challenging the constitutionality of this Act, in the following language:

> ". . . It is urged that the sale, a local transaction, is fully completed before any interstate commerce begins and that the attempt to fix the price or other elements of that incident violates the Tenth Amendment. *But where commodities are bought* for use beyond state lines, the sale is a part of interstate commerce. Where local and foreign milk alike are drawn into a general plan for protecting the interstate commerce in the commodity from the interferences, burdens and obstructions, arising from excessive surplus and the social and sanitary evils of low values, the power of the Congress extends also to the local sales" (*id.* at 568-569).

We submit that this situation is completely distinguishable from the instant situation in a number of respects. Here there was no showing that any of the retail sales by any local Carvel franchisee travelled, or were intended to travel across state lines. Nor was it even contended that the interstate retail sales of some four hundred Carvel franchisees scattered throughout the eastern part of the United States could have any appreciable effect on interstate commerce.

Nor is *United States* v. *Standard Oil Co., supra*, at 864-865 in point. That case, insofar as it was relied upon by the trial court, held only that a distributive system of a producer and distributor of petroleum products which in-

volved constant interstate flow of such products and the interstate origin of many competitive products, automobile supplies and accessories was not a local matter outside the scope of the federal antitrust laws. It is true that the court in *Standard* noted that:

> "The control of a commodity originating in interstate commerce, although exercised after it comes to rest in a state, does not take it out of the purview of the Sherman or Clayton Acts, *if the flow is continuous, and if the restrictions affect it*" (*supra*, at 864).

But the fact is that in the instant case, it cannot be disputed that any continuous flow in interstate commerce is interrupted prior to the attachment of the alleged price fixing restrictions of which petitioners complain. The cessation of any continuous flow in interstate commerce is interrupted when the ingredients received by the individual franchisees are utilized by them in the manufacture and local retail sale of completely new Carvel ice cream products.

CONCLUSION

The entire tenor and thrust of petitioners' brief is aimed at persuading this Court to ignore the findings and conclusions of both Courts below and re-evaluate the evidence de novo.

No clear and basic error has been shown. No mistake has been pointed out in the principles of law applied to the facts and inferences, as found in the decisions below. This Court has consistently declined invitations "to try the case *de novo*." *Timken, supra,* 341 U.S. 593 at 597; *United States* v. *E. I. Du Pont de Nemours & Co.,* 351 U.S. 377 (1956) at 381; *United States* v. *Yellow Cab Co.,* 338 U.S. 338, 341 (1949).

Pick Manufacturing, supra, 299 U.S. 3, 4, a case analogous in material respects to this case, affirmed the judgment appealed from on concurrent findings of the courts below, that the Chevrolet dealer agreement was not violative of the antitrust laws. The Court said:

> "Under the established rule, this court accepts the findings in which two courts concur unless clear error is shown."

Application of this rule is not avoided by a showing that some of the evidence permits conflicting inferences. Nor does a dissent below inhibit acceptance of the findings of the lower courts on the facts. *Texas & N.O.R. Co.* v. *Brotherhood Ry. & S.S. Clerks,* 281 U.S. 548, 558-559, 560 (1930).

Petitioners limited themselves by their own choice to rely almost entirely on documentary evidence. Practically the only matter about which they have not raised any

question here, as they did not in the courts below, is their stipulation, incorporated by the trial judge in the pre-trial order, to rely exclusively on *per se* unlawfulness of the various agreements. Despite this, the evidence introduced at the trial was not limited by ruling or order of the court to what would be strictly germane for consideration of the case exclusively as one to be decided under the *per se* rule. Petitioners have not complained of any such rulings. There were none. Actually based on the evidence, the findings of the district court do not reflect a strict or narrow application of the *per se* rule. On the contrary, those findings reflect a careful weighing of all the evidence and the application to it of all pertinent criteria for ascertaining violations of the antitrust laws.

Likewise, the Court of Appeals in affirming the District Court made independent findings on the record as a whole not confining itself to the boundaries of *per se* violations, factually or legally. The Court concurred with the District Court unanimously, except for the one question which was the occasion of the dissent by Chief Judge Lumbard. He questioned whether there was sufficient evidence of justification for measures taken to protect the good will of the business. This question related to whether a tying arrangement could be said to exist. The findings, inferences and analysis in the majority Opinion show that a tying arrangement did *not* exist. Nor could it have existed, even for Chief Judge Lumbard without an innovation, which his dissenting opinion suggests, of introducing a presumption based on the licensing of a trademark. The evidence shows no basis for believing anything but that the findings of both courts are amply supported.

It has been our endeavor to show, not merely that the concurrent findings of both courts are free from clear error, but that the findings are supported by fair substantial evidence in the record.

We respectfully submit that there is no merit to the position of petitioners, and the judgments should be affirmed.

Respectfully submitted,

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Dated: New York, N. Y.
February 17, 1965

APPENDIX "A"

Listing of Inaccurate or Misleading Statement of Fact Set Forth in First Nine Pages of Petitioners' Brief.

1. At page "4" of petitioners' brief the statement is made:

> "In connection and simultaneously with the execution of the franchise agreements (Pl. Ex. 1, R. 208, 3149, and Ex. 2, R. 221, 3150), Carvel sells and leases to the dealer the patented freezer and other patented and unpatented equipment required for the operation of a franchised store (R. 34, 35; Pl. Ex. 3, R. 349, 3154; Ex. 4, R. 239, 3156; Ex. 6, R. 242, 2158)."

The statement is inaccurate because it ignores the fact that there was no testimony or any other evidence introduced to establish that in fact petitioners, or any of them, or any Carvel franchisee was compelled to buy equipment from Carvel. Indeed the evidence established that franchisees, including petitioners' were free to buy equipment from whatever source they wanted, provided Carvel specifications were met, and in fact exercised that right (R. 167, 170, Pl. Ex. 8A, § M, 3165; Def. Ex. C-5, R. 295-314, 3525).

2. At page "4" of petitioners' brief the further statement is made:

> "By Ex. 6, Carvel leases to the dealer, amongst other things, patented equipment for use in the operation of the franchised store, conditioned upon the lessee's faithful performance of the terms of the land lease covering the store premises."

The contents of Exhibit 6 show that this statement is misleading and inaccurate. It fails to disclose that the

so-called "patented equipment" leased to the dealer under Pl. Ex. 6 (R. 242, 3157), the "Signs and Special Equipment Lease", merely consists of various *design* patented items identifying the franchisee and his products as being "Carvel". More specifically the items which petitioners refer to as "patented equipment" consist of the front plate, valve, and decorator tip which gives the distinctive identifying swirl to the Carvel ice cream product as it is made by the franchisee (R. 168); two twelve foot neon signs displaying the name "Carvel"; and two Carvel "crown and cone" identifying insignias.

3. At page "4" of petitioners' brief, the still further statement is made:

> "The franchise agreements require the dealer to purchase from Carvel or its designated approved sources his entire requirements of mix, toppings, flavorings, cones and all other ingredients or supplies whether they are integral parts of the soft ice cream end product or merely used in connection with the sale thereof to the ultimate consumer. All such ingredients and supplies are sold by Carvel to the dealer at a profit."

The statement is misleading and inaccurate for several reasons.

First, that portion of the above statement to the effect that the franchise agreements require the franchise to purchase from Carvel or its designated approved sources "all other ingredients or supplies whether they are integral parts of the soft ice cream end product or merely used in

connection with the sale thereof to the ultimate consumer" is flatly untrue. The post-1955 franchise agreement clearly provides that the only ingredients required to be purchased from Carvel or Carvel approved sources are the "items sold as a part of the end product that is offered for consumption to the retail purchaser" (Pl. Ex. 1, R. 208, 211, Par. "SIXTH", 3148).

Second, there was no evidence introduced to show that all "ingredients and supplies are sold by Carvel to the dealer at a profit". The only evidence on this point related to cones, as to which it was established (and so found by the Court of Appeals) that these were sold to the franchisees at a price substantially below wholesale price (R. *443*, fn. 7) with Carvel's mark-up being just about 5% (R. *451*) out of which Carvel would have had to recoup its overhead expense.

4. At page "5" of petitioners' brief the statement is made:

> "The specifications for cones are that they be 'of a quality no less good than the standard quality cones produced by the Supplier at the time of the execution of this agreement' (Pl. Ex. 11, R. 264, 3186, 7)."

The statement is misleading because it ignores the fact that there are additional specifications prescribed for the manufacture of the cones, such as the design of said cones, and precise measurements as to height and outside diameter, and that the contract provides that the cone manufacturer shall be obligated to make cones of said design "only for Carvel, and for no other person" (Pl. Ex. 11, R. 264, 265, 3186).

Appendix "A"

5. At page "5" of petitioners' brief the following statement is made:

> "All other ingredients and supplies are manufactured for Carvel by designated suppliers in accordance with specifications and standards of quality furnished by Carvel (R. 39, 41, 197, 199, 200, 203).
>
> In this connection, Walter Simonsen, Hood's sales manager (R. 180), testified that there are many concerns who supply comparable flavorings (R. 39). Fred Vettel, Jr., Carvel's general manager (R. 32) also admitted that ingredients of comparable quality are obtainable from other than Carvel designated sources, but that Carvel does not furnish dealers with specifications and would not permit the dealer to purchase same even if they met Carvel specifications (R. 40, 1). He asserted that it would be impossible for Carvel to determine whether its dealers were following the specifications (R. 41)."

The statement is incorrect and misleading for several reasons.

First, it ignores uncontradicted testimony that the "end product" ingredients (in addition to the mix) are not only made up pursuant to specifications and standards furnished by Carvel, but that the Carvel syrups, toppings and flavorings are also made up pursuant to Carvel special formulas (R. 197, 198-199).

Second, that portion of the above statement to the effect that Simonsen testified that "there are many concerns who supply comparable flavorings (R. 39)" is false. A reading of R. 39 will reflect that the testimony actually given by Simonsen was that there was a "number of concerns" which

supplied flavoring "which is of good quality". The uncontradicted testimony of Vettel was that most of the "end product" ingredients made for Carvel were made up only for Carvel and that equivalent syrups and flavorings were not available to the general trade (R. 200, 203).

Third, that portion of the above statement to the effect that Vettel testified that "ingredients of comparable quality are obtainable from other than Carvel designated sources" is also inaccurate and misleading. Vettel's exact testimony (at R. 40, 41) cited by petitioners, was that he "would assume" that "nuts" and "cherries" of the "same quality" were obtainable from suppliers other than Carvel suppliers.* The overwhelming number of the 70 "end product" ingredients which must be purchased from Carvel (Pl. Ex. 8A, § H, Supply List No. 1, 3165) are covered by Vettel's testimony that they are made only for Carvel, pursuant to Carvel formula, and are not available to the general trade (R. 200, 203). In addition the above statement is a misleadingly incomplete one since the fact that "end product" ingredients are of comparable quality does not mean that they can be used interchangeably in making a uniform, high quality, ice cream product, since there is the additional important factor of the *compatibility* of each ingredient with the ice cream mix and with the machine (e.g. see R. 197-198).

Finally, with respect to the last portion of the statement in petitioners' brief about Carvel not permitting dealers

* At the same time Vettel's uncontradicted testimony was that while the nuts purchased by Carvel were "not superior to nuts that may be obtained of the same quality elsewhere", they were "superior in quality to some of the nuts available from other sources" (R. 40).

to purchase "end product" ingredients from sources other than Carvel, the exact testimony was as follows:

> "Q. Have you ever advised the Carvel store dealer that he can purchase those products [i.e., the 'end product' ingredients] from non-Carvel sources providing they meet Carvel specifications? A. No, we have not.
>
> Q. It is a fact, is it not, that Carvel does not permit that? A. We don't permit it because it would be impossible to police it, impossible to control it, it would be impossible in any way to determine whether each of the hundreds of dealers were following those specifications" (R. 41).

6. At page "5" of petitioners' brief the further statement is made:

> "The agreements also prohibit the dealer from operating a competitive dairy products business anywhere during the term of the agreement."

The statement is misleading. The franchise agreement actually provides that the franchisee "agrees that he will devote his best efforts and his entire time to the operation of the Carvel Store herein mentioned" (Pl. Ex. 1, R. 208, 213 Par. "ELEVENTH", 3148).

7. At page "6" of petitioners' brief the statement is made:

> "Further requirements were a conditional reassignment of the lease by the dealer to Carvel as security for the former's adherence to the terms of the franchise (Pl. Ex. 7, R. 245, 3162)."

Appendix "A"

Petitioners' conclusion that the conditional reassignment of the lease is designed to secure adherence to the franchise is unsupported by the Record. In fact this is realistically the only way open to Carvel to insure that its distinctive, design patented building will be used only for the sale of Carvel ice cream products.

8. At page "6" of petitioners' brief the further statement is made:

> "It is conceded that the end product manufactured by the dealer is a new product not delivered by Carvel (R. 15)."

The statement is incomplete in material respects and therefore misleading. It ignores the fact that while the end product may be a "new product not delivered by Carvel", it is in fact Carvel ice cream, made from special Carvel ingredients, pursuant to Carvel recipes, instructions and standards. Most important, the "end product" is explicitly identified and advertised to the public as being distinctive *Carvel* ice cream (e.g., see Defs. Ex. C-8, R. 425-427, 3482; Pl. Ex. 39, 3280). The District Court explicitly and correctly found that: "The end product which was sold to the public *was Carvel ice cream* and it was this product to which the Carvel trademark and good will attached" (R. 58, emphasis in original).

9. At page "8" of petitioners' brief the statement is made:

> "Par. 30 requires the dealer, in the event his volume of business reaches a certain figure, to purchase additional Carvel equipment."

The statement is misleading as it neglects to mention that since February, 1956 Par. 30 has been subject to written modification to the effect that the dealer is free to buy equipment from any source he desires provided Carvel specifications are met (Defs. Ex. C-1B, R. 283, 3514).

10. At page "9" of petitioners' brief the statement is made:

> "Invariably, such sign material is furnished with the retail price already printed thereon."

The statement is unsupported by any Record reference. In fact, the evidence introduced at trial was that in addition to price change stickers being made available by Carvel to the franchisees, signs without any prices were also freely made available, and that when Carvel did not have a sign available that a franchisee might request, permission was granted to him to have his own sign made up (R. 162-163; Defs. Exs. C-15, 3516; C-16, 3517; C-17, 3517; Def. Ex. C-3, R. 285, 286-288, 3522; Pl. Ex. 27, R. 274, 3259; Pl. Ex. 43, R. 276, 3284).

APPENDIX "B"

Trademarks for Ice Cream Products Owned by Companies with Main Offices in the Five State Area* as Published in the Official Gazette of the Patent Office Pursuant to §1062(a), Title 15, U.S.C.A. from January, 1955 to January, 1965

	Date of Publication for Opposition**	Date of Publication as Registered**	Mark***	Name and Address of Owner
1.	1/19/65		Frostee Humor	Good Humor Corporation, Englewood Cliffs, N.J.
2.	1/19/65		Colonial	Dolly Madison Foods, Inc. Philadelphia, Pa.
3.	1/19/65		Birds Eye	General Foods Corporation, White Plains, N.Y.
4.	1/5/65		Woodlawn	Dolly Madison Foods, Inc. d/b/a Woodlawn Farm Dairy Co., Scranton, Pa.
5.	12/15/64		Whammy-Stix	Good Humor Corporation, Englewood Cliffs, N.J.
6.	12/15/64		Wahoo Bar	Good Humor Corporation, Englewood Cliffs, N.J.
7.	12/15/64		Bullet	Fruit Products Corporation, Englewood, N.J.
8.	12/1/64		Sodaburst	General Foods Corporation, White Plains, N.Y.

* New York, New Jersey, Massachusetts, Pennsylvania and Connecticut.

** Dates refer to the weekly issues of the Gazette; all publications listed here are under Class 46—"Foods and Ingredients of Foods". As to Nos. 1-9 sufficient time has not yet passed to ascertain whether said marks will or will not be published as registered.

*** Marks listed do not include: (a) marks registered as service marks; (b) marks registered on the supplemental register; (c) marks registered under state trademark laws; (d) marks in use during this period but previously registered by owners in the five state area; (e) marks in use in this area during the period but registered by owners outside of the five state area; (f) marks in use during the period and in the area but not registered under either federal or state statutes; (g) marks issued to Carvel.

Appendix "B"

	Date of Publication for Opposition	Date of Publication as Registered	Mark	Name and Address of Owner
9.	9/22/64		MR. COOL	National Dairy Products Corporation, New York, N.Y.
10.	9/15/64	12/1/64	Good Humor	Good Humor Corporation, Englewood Cliffs, N.J.
11.	5/1/62	7/17/62	Van DeKamp's	General Baking Co., New York, N.Y.
12.	8/25/64	11/10/64	Top-Ems	Beaver Home Products Company, Tennsauken, N.J.
13.	8/18/64	11/3/64	Jahn's Since 1897	Jahn's Since 1897 Inc., Brooklyn, N.Y.
14.	8/18/64	11/3/64	Cartoon drawing of a boy's face with a bow tie	Court-Leigh Corp., Brooklyn, N.Y.
15.	6/23/64	9/8/64	Meteor	Joe Lowe Corporation, Englewood, N.J.
16.	6/23/64	9/8/62	Space-Shots	Joe Lowe Corporation, Englewood, N.J.
17.	6/23/64	9/8/63	Cosmaut	Joe Lowe Corporation, Englewood, N.J
18.	6/23/64	9/8/64	Zoomer	Joe Lowe Corporation, Englewood, N.J.
19.	6/23/64	9/8/64	Astral	Joe Lowe Corporation, Englewood, N.J.
20.	6/2/64	8/18/64	Super Humor	Good Humor Corporation, Englewood Cliffs, N.J.
21.	5/19/64	8/4/64	Country Corner	Good Humor Corporation, Brooklyn, N.Y.
22.	4/28/64	7/14/64	Coatswell	Hooton Chocolate Company, Newark, N.J.
23.	4/28/64	7/14/64	Flavorcoat	Hooton Chocolate Company, Newark, N.J.
24.	4/28/64	7/14/64	Outside-Inside	Good Humor Corporation, Englewood Cliffs, N.J.

Appendix "B"

	Date of Publication for Opposition	Date of Publication as Registered	Mark	Name and Address of Owner
25.	3/24/64	6/9/64	Jet Missile	Fruit Products Corporation, New York, N.Y.
26.	3/10/64	5/26/64	Jungle Stripe	Good Humor Corporation, Hoboken, N.J.
27.	3/3/64	5/19/64	Party Cake	Joe Lowe Corporation, New York, N.Y.
28.	2/4/64	4/21/64	Revelry	Joe Lowe Corporation, New York, N.Y.
29.	1/14/64	3/31/64	Cartoon representation of ice cream man with ice cream on a stick	Good Humor Corporation, Brooklyn, N.Y.
30.	12/17/63	3/3/64	Boutique	The Borden Company, New York, N.Y.
31.	11/19/63	3/31/64	Acme Ideal	Acme Markets, Inc., Philadelphia, Pa.
32.	11/19/63	2/4/64	Instant-Chef	Christie Food Products, Inc., Boston, Mass.
33.	11/19/63	2/4/64	Dairylea	Dairymen's League Cooperative Association, Inc., New York, N.Y.
34.	11/5/63	1/21/64	Sherbsicle	Joe Lowe Corporation, New York, N.Y.
35.	11/5/63	1/21/64	Sherbo-Split	Joe Lowe Corporation, New York, N.Y.
36.	10/29/63	1/14/64	A representation of three coins and the Trevi Fountain with the words Three Coins	Yorktowne Ice Cream Products Co., York, Pa.
37.	10/22/63	1/7/64	C-414	Hooton Chocolate Company, Newark, N.J.
38.	10/1/63	12/17/64	Sheffield Farms	National Dairy Products Corporation, New York, N.Y.
39.	9/24/63	12/10/63	Cloverdale	First National Stores, Inc., Somerville, Mass.
40.	9/17/63	12/3/63	Candy-Kid	Joe Lowe Corporation, New York, N.Y.

Appendix "B"

	Date of Publication for Opposition	Date of Publication as Registered	Mark	Name and Address of Owner
41.	9/3/63	11/19/63	Thindip	Joe Lowe Corporation, New York, N.Y.
42.	7/30/63	11/26/63	Carriage Trade Representation of a horse and carriage	Newport Carriage Trade, Inc., New York, N.Y.
43.	7/23/63	11/8/63	Glenside	Acme Markets, Inc. Philadelphia, Pa.
44.	7/16/63	10/1/63	Jahn's	Jahn's Since 1897, Inc., Brooklyn, N.Y.
45.	7/16/63	10/1/63	Barbana	Barbana Frozen Foods, Inc., York, Pa.
46.	7/9/63	9/24/63	Blackman's	M. R. Blackman & Co., Inc., Philadelphia, Pa.
47.	7/9/63	9/24/63	Blackman's Since 1909	M. R. Blackman & Co., Inc., Philadelphia, Pa.
48.	6/25/63	9/10/63	Sugar-Quick	J. A. Joffe & Co., Inc., Mt. Vernon, N.Y.
49.	6/4/63	8/20/63	Thin-Flo	Joe Lowe Corporation, New York, N.Y.
50.	5/21/63	8/6/63	Jolly Roger	Jolly Roger Dairy Products, Inc., Johnsville, Pa.
51.	5/14/63	7/30/63	Lady Penn	Penn Dairies, Inc., Lancaster, Pa.
52.	5/14/63	7/30/63	Dutch Gold	W. Ralph Ganiber, d/b/a Lancaster County Dutch Gold Apiaries, Lancaster, Pa
53.	4/23/63	7/9/63	Aktiv	Crowley's Milk Company, Inc., Binghamton, N.Y.
54.	3/19/63	6/4/63	Marvel	The Great Atlantic & Pacific Tea Company, Inc., New York, N.Y.
55.	3/12/63	5/28/63	Brigham's	Brigham's, Inc. Cambridge, Mass.
56.	3/5/63	5/21/63	Big 5	Fruit Products Corporation, New York, N.Y.

Appendix "B"

	Date of Publication for Opposition	Date of Publication as Registered	Mark	Name and Address of Owner
57.	2/26/63	5/14/63	Acme Virginia Lee	Acme Markets, Inc., Philadelphia, Pa.
58.	2/26/63	5/14/63	Over-Under Stix	Good Humor Corporation, Brooklyn, N.Y.
59.	12/18/62	3/5/63	Cherry Nugget	National Dairy Products Corporation, New York, N.Y.
60.	12/4/62	2/19/63	Lo-M-Lo	Germantown Manufacturing Company, Phila., Pa.
61.	11/27/62	2/12/63	Martin Century Farms	Martin Century Farms, Inc., Lansdale, Pa.
62.	10/16/62	5/7/63	Mr. Krunch	Joe Lowe Corporation, New York, N.Y.
63.	7/24/62	10/9/62	Charles Continental	Oak Point Creameries, Inc., New York, N.Y.
64.	5/22/62	8/7/62	Whole "N" One	Joe Lowe Corporation, New York, N.Y.
65.	5/15/62	7/31/62	Dubl-Whammy	Good Humor Corporation, Brooklyn, N.Y.
66.	5/15/62	7/31/62	Sealtest	National Dairy Products Corporation, New York, N.Y.
67.	5/8/62	7/24/62	Engle Farm Dairies	Sunbury Milk Products Company, d/b/a Engle Farm Dairies, Sunbury, Pa.
68.	2/27/62	5/15/62	"V" Cote	Joe Lowe Corporation, New York, N.Y.
69.	2/13/62	5/29/62	A representation of a mobile ice cream vending vehicle with an ice cream cone on top and the words Dairy Dan	Dairy Dan Inc. Wilkes Barre, Pa.
70.	1/30/62	4/17/62	Home Treat	The Borden Company, New York, N.Y.

Appendix "B"

	Date of Publication for Opposition	Date of Publication as Registered	Mark	Name and Address of Owner
71.	1/9/62	3/27/62	Hi-Cote	Joe Lowe Corporation, New York, N.Y.
72.	11/21/61	2/6/62	Vesta	Vesta, Inc., d/b/a Vesta, New York, N.Y.
73.	10/10/61	12/26/61	Crown saying de Pasquale's, above a curtain which surrounds the words Genuine Spumoni Deluxe Italian Ice Cream with a picture of a Spumoni Brick and a piece of Spumoni	Patrick J. de Pasquale, d/b/a De Pasquale Spumoni Company, Hartford, Conn.
74.	9/19/61	12/5/61	Tally Ho	Hershey Creamery Company, Harrisburg, Pa.
75.	5/23/61	8/8/61	Tinkle Bell with a cartoon representation of a child	Ace High Distributors, Inc., New York, N.Y.
76.	5/23/61	8/8/61	Miss Dairylea	Dairymen's League Cooperative Association, Inc., New York, N.Y.
77.	5/9/61	7/25/61	A square design with the word Rosebrand and drawings of roses thereon	Rose Brand Syrup Supply Co., Inc., Brooklyn, N.Y.
78.	4/25/61	7/11/61	Frigid treats	Clarence R. Hiester, d/b/a Schell's Dairy Swirl, Temple, Pa.
79.	3/21/61	6/6/61	Cherry Cherie	Foremost Dairies, Inc., New York, N.Y.
80.	2/28/61	5/16/61	Tootsie Roll	The Sweets Company of America, Incorporated, Hoboken, N.J.
81.	1/24/61	4/11/61	Ollie Orbit	Five Guys From Boston, Ind., d/b/a Oli Orbit, Boston, Mass.
82.	1/3/61	1/3/61	Jane Logan	Abbotts Dairies, Incorporated Phila., Pa.

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	Date of Publication for Opposition	Date of Publication as Registered	Mark	Name and Address of Owner
83.	12/20/60	3/7/61	Dri-cote	Joe Lowe Corporation, New York, N. Y.
84.	11/29/60	2/14/61	Kool-Pops	General Foods Corporation, White Plains, N.Y.
85.	10/4/60	12/20/60	Unity	Frankford Grocery Company, Phila., Pa.
86.	9/13/60	11/29/60	Flagship	Vincent Sardo, d/b/a Flagship Ice Cream, Ridgewood, N.J.
87.	8/9/60	11/1/60	Sunshine Cup	H. P. Hood & Sons, Inc., d/b/a H. P. Hood & Sons, Boston, Mass.
88.	6/21/60	9/6/60	Class-Mate	D.C.A. Food Industries, Inc., New York, N.Y.
89.	6/7/60	8/23/60	Jelly Bean	Flavor Saver, Inc. Cambria Heights, N.Y.
90.	5/3/60	7/19/60	"Here's Howe"	George J. Howe Company, Inc., Grove City, Pa.
91.	4/26/60	7/12/60	A representation of a cow and a child with the words Crowley's Fresh Fresh	Crowley's Milk Company, Inc. Binghamton, N.Y.
92.	4/5/60	6/21/60	Shimmy	H. P. Hood & Sons, Inc., Boston, Mass.
93.	3/15/60	5/31/60	Giant Penguin	H. P. Hood & Sons, Inc., Boston, Mass.
94.	3/15/60	5/31/60	Cakesicle	Joe Lowe Corporation, New York, N.Y.
95.	10/18/60	1/3/61	Queen of Tarts	Hubert H. Hartman, d/b/a Dairy Queen, Fairport, New York
96.	3/8/60	5/24/60	5 star	Germantown Manufacturing Company, Phila., Pa.
97.	3/8/60	5/24/60	Monoflo	Germantown Manufacturing Company, Phila., Pa.

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	Date of Publication for Opposition	Date of Publication as Registered	Mark	Name and Address of Owner
98.	3/8/60	5/24/60	S.C. Special	Germantown Manufacturing Company, Phila., Pa.
99.	1/19/60	4/5/60	Flavor Kist	Food Fair Stores, Inc., Philadelphia, Pa.
100.	11/17/59	2/2/60	Bartolini	Bartolini Ice Cream Company, New York, N.Y.
101.	11/10/59	1/26/60	Chocorich	Rose Brand Syrup Supply Co., Inc., Bklyn., N.Y.
102.	10/27/59	1/12/60	Suburban Farms	H. P. Hood & Sons, Inc., Boston, Mass.
103.	10/27/59	1/12/60	A caricature of a man inside a black ellipse under which is written Peter Plenty	Quik-Shop Corporation, Hastings-On-Hudson, N.Y.
104.	10/13/59	12/29/59	Sol-Kwik	Lanco Products Corporation New York, N.Y.
105.	9/29/59	12/15/59	Sorrento	Dairycrest Ice Cream Co., Inc., Brooklyn, N.Y.
106.	9/22/59	12/8/59	Black circle with a coronet under which is the word Coronet and the words By Hood	H. P. Hood & Sons, Inc., Boston, Mass.
107.	8/18/59	11/3/59	School Time	Joe Lowe Corporation, New York, N.Y.
108.	8/11/59	10/27/59	Bouquet	American Can Company, Easton, Pa.
109.	7/21/59	10/6/59	Oronoque Orchards	Winton Brothers, Inc., Stratford, Conn.
110.	7/21/59	10/6/59	Sugar-Lo	Kaydee Ice Cream Co., Atlantic City, N.J.
111.	7/7/59	9/22/59	A silhouette of a man, woman and child in a circle surrounded by the words Direct From Our Farm To You, and the word Dairylea	Dairymen's League Cooperative Association, Inc., New York, N.Y.

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	Date of Publication for Opposition	Date of Publication as Registered	Mark	Name and Address of Owner
112.	6/30/59	9/15/59	Mono-Dri	Lanco Products Corporation, New York, N.Y.
113.	6/23/59	9/8/59	Figure-8 (a collective mark)	All Star Dairy Association, Inc., New York, N.Y.
114.	6/23/59	9/8/59	A silhouette of a woman and the words Figure-8 inside an outline of a V and an inverted V	All Star Dairy Association, Inc., New York, N.Y.
115.	6/2/59	6/27/61	Dairy Dan	Dairy Dan Incorporated, Wilkes Barre, Pa.
116.	5/19/59	8/4/59	A cartoon figure of a child wearing a hat with the name Miss Dairylea, and holding a glass of milk	Dairymen's League Co-operative Association, Inc., New York, N.Y.
117.	5/12/59	7/28/59	A cartoon figure of a woman's head and the words Sweet Life	Sweet Life Brands, Inc. Schenectady, N.Y.
118.	3/17/59	6/2/59	A cartoon drawing of a boy's face	Haxton Foods, Inc., Oakfield, N.Y.
119.	3/17/59	6/2/59	Park Club	Loblaw, Inc., Buffalo, N.Y.
120.	12/23/58	3/10/59	La Cafe Chambord inside a crest	Cafe Chambord, Inc., d/b/a Chambord Kitchen, New York, N.Y.
121.	12/16/58	3/3/59	Choc-Frost	Fruit Products Corporation, New York, N.Y.
122.	12/9/58	5/5/59	Sweet Life	Sweet Life Brands, Inc., Schenectady, N.Y.
123.	12/2/58	2/17/59	Evans Topping	E. B. Evans, Inc., Philadelphia, Pa.
124.	9/30/58	12/16/58	Orange Blossom	Hershey Creamery Co., Harrisburg, Pa.
125.	9/30/58	12/16/58	Regalia, with a cartoon of a king in a castle	Dairymen's League Cooperative Association, Inc., New York, N.Y.

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	Date of Publication for Opposition	Date of Publication as Registered	Mark	Name and Address of Owner
126.	9/30/58	12/16/58	Regalia	Dairymen's League Cooperative Association, Inc., New York, N.Y.
127.	9/16/58	12/2/58	Koko-Freeze	H. P. Hood & Sons, Inc., Boston, Mass.
128.	9/9/58	11/25/58	Chiquita's	United Fruit Company, Boston, Mass.
129.	8/26/58	11/11/58	Dairylea	Dairymen's League Cooperative Association, Inc., New York, N.Y.
130.	8/26/58	11/11/58	Maltanza	Fruit Products Corporation, New York, N.Y.
131.	8/26/58	11/11/58	Royal	Standard Brands; Incorporated, New York, N.Y.
132.	8/5/58	10/21/58	Melomalt	The Borden Company, New York, N.Y.
133.	7/29/58	10/14/58	Fudjo	Hershey Creamery Company Harrisburg, Pa.
134.	7/29/58	10/14/58	Econ-o-way	The Borden Company, New York, N.Y.
135.	7/8/58	4/26/60	Golden Dawn	Golden Dawn Foods, Sharon, Pa.
136.	6/10/58	8/26/58	Gold Mine	Donut Corporation of America, New York, N.Y., now by change of name, DCA Food Industries, Inc.
137.	5/27/58	8/12/58	Hershey's	Hershey Creamery Company, Harrisburg, Pa.
138.	4/22/58	7/8/58	Drimix	The Borden Company, New York, N.Y.
139.	4/8/58	6/24/58	Vera Cruz and a crest	Limpert Brothers, Incorporated, New York, N.Y.
140.	4/8/58	6/24/58	A cartoon drawing of a face with a soft ice cream swirl on its head and the words Mr. Softee	Mr. Softee, Inc. Philadelphia, Pa.

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	Date of Publication for Opposition	Date of Publication as Registered	Mark	Name and Address of Owner
141.	2/25/58	5/13/58	Regency	National Dairy Products Corporation, New York, N. Y.
142.	1/28/58	12/23/58	Bonnie Bar	I. N. Hagan Ice Cream Company, Uniontown, Pa.
143.	1/21/58	4/8/58	Svelte	The Borden Company, New York, N.Y.
144.	1/14/58	4/1/58	A drawing of a bird over the word Distelfink, which means gold finch	Distelfink, Inc., Harrisburg, Pa.
145.	12/31/57	3/18/58	All Star	John D. Utterback, Danbury, Conn.
146.	12/10/57	2/25/58	Big Wheel with a cartoon character on a bicycle, holding an ice cream cone	Oak Point Dairies of New Jersey, Newark, N.J.
147.	11/5/57	1/21/58	Dolly Madison over a silhouette of Dolly Madison	Philadelphia Dairy Products Company, Inc., Philadelphia, Pa.
148.	11/5/57	1/21/58	A silhouette of Dolly Madison	Philadelphia Dairy Products Company, Inc., Philadelphia, Pa.
149.	10/29/57	1/14/58	Missle	Fruit Products Corporation, New York, N.Y.
150.	9/3/57	11/19/57	Saroma	Standard Brands, Incorporated, New York, N.Y.
151.	8/20/57	11/5/57	Miss Bonnie	I. N. Hagan Ice Cream Company, Uniontown, Pa.
152.	8/20/57	11/5/57	Handie	I. N. Hagan Ice Cream Company, Uniontown, Pa.
153.	7/23/57	10/8/57	The word Stewart's over a drawing of a small lamb	Stewart's Ice Cream Company, Inc., Saratoga Springs, N.Y.
154.	7/16/57	10/1/57	Denise	R & G Milk Products, Inc., Bronx, N.Y.

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	Date of Publication for Opposition	Date of Publication as Registered	Mark	Name and Address of Owner
155.	6/4/57	8/20/57	A hexagon with a churn and the word Dacoa	Dairy Corporation of America, New York, N.Y.
156.	5/21/57	8/6/57	Breakstone's	Breakstone Brothers, Inc., New York, N.Y. To National Dairy Products Corporation, New York, N.Y.
157	5/14/57	7/30/57	A drawing of a cow's head with the word Hood	H. P. Hood & Sons, Inc., Boston, Mass.
158.	3/12/57	5/28/57	A cartoon character inside a circle with the words Woody Woodlawn	Woodlawn Farm Dairy Company, Scranton, Pa.
159.	3/5/57	5/21/57	Hood	H. P. Hood & Sons, Inc., Boston, Mass.
160.	3/5/57	5/21/57	Harmonica	Milkmaid Ice Cream Company, Inc., White Plains, N.Y.
161.	2/19/57	5/7/57	Maltee-Frost	Fruit Products Corporation, New York, N.Y.
162.	12/11/56	2/26/57	Ice creamwich	Abbotts Dairies, Incorporated, Philadelphia, Pa.
163.	11/27/56	1/24/59	Chico	Dolly Fruit Products Corp., Brooklyn, N.Y.
164.	11/6/56	1/22/57	Early American	Hershey Creamery Company, Harrisburg, Pa.
165.	10/16/56	1/1/57	Nysice	Joe Lowe Corporation, New York, N.Y.
166.	10/9/56	12/25/56	Barbato Continental	Arden Farms Co., Long Island City, N.Y.
167.	10/2/56	12/18/56	Progress Its Flavor Wins Favor	The Borden Company, New York, N.Y.
168.	10/2/56	12/18/56	Bestovall	H. A. Johnson Company, Boston, Mass.

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	Date of Publication for Opposition	Date of Publication as Registered	Mark	Name and Address of Owner
169.	8/14/56	9/10/57	Lollapalooza	Fruit Products Corporation, New York, N.Y.
170.	6/12/56	8/28/56	Vari-Top	American Food Laboratories, Inc., Brooklyn, N.Y.
171.	5/29/56	8/14/56	Sno-Frost	The Borden Company, New York, N.Y.
172.	5/22/56	8/7/56	Glacier Freeze	The Borden Company, New York, N.Y.
173.	5/22/56	8/7/56	C-It-All and design	Milkmaid Ice Cream Co., Inc., Rochester, N.Y.
174.	5/1/56	7/17/56	Polar Club	The Borden Company, New York, N.Y.
175.	4/3/56	6/19/56	Duncan Hines	Hines-Park Foods, Inc., Ithaca, N.Y.
176.	3/6/56	5/22/56	Tally Ho Farms	Hershey Creamery Company, Harrisburg, Pa.
177.	1/3/56	3/27/56	Merry-Molds	The Borden Company, New York, N.Y.
178.	1/3/56	3/20/56	Ciro's	Senator Frozen Products, Inc., New York, N.Y.
179.	12/13/55	3/6/56	Country Club	Country Club Ice Cream Company, Paterson, N.J.
180.	11/29/55	2/21/56	Hi Boy	Wendt's Cream Top Dairy, Inc., d/b/a Wendt's, Niagara Falls, N.Y.
181.	11/22/55	10/2/56	Freshpak	The Grand Union Company, East Paterson, N.J.
182.	11/22/55	2/14/56	Nancy Lynn	The Grand Union Company, East Paterson, N.J.
183.	11/8/55	1/31/56	Tricy Treat	Fruit Products Corporation, New York, N.Y.
184.	11/8/55	1/31/56	Elm Farm	Elm Farm Foods Co., Dorchester, Boston, Mass.

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	Date of Publication for Opposition	Date of Publication as Registered	Mark	Name and Address of Owner
185.	10/25/55	1/24/56	Popsicle	Joe Lowe Corporation, New York, N.Y.
186.	10/25/55	1/17/56	Igloo	H. P. Hood & Sons, Inc., Boston, Mass.
187.	10/4/55	1/3/56	Sundae Snack	Sea Smack Company, Philadelphia, Pa.
188.	9/27/55	12/27/55	Dutch Gold and design	Lancaster County Dutch Gold Apiaries, Lancaster, Pa.
189.	9/27/55	12/27/55	Pensupreme	Penn Dairies, Inc., Lancaster, Pa.
190.	7/26/55	11/27/56	Dubl I-Stix	Good Humor Corporation, Brooklyn, N.Y.
191.	7/19/55	10/25/55	Screen Star Bar	Joe Lowe Corporation, New York, N.Y.
192.	7/19/55	10/25/55	Picture Pop	Joe Lowe Corporation, New York, N.Y.
193.	7/12/55	10/18/55	Miss Sno-Frost	The Borden Company, New York, N.Y.
194.	7/5/55	10/11/55	Bigga Ba	Joe Lowe Corporation, New York, N.Y.
195.	7/5/55	10/11/55	Charlotte Freeze	The Borden Company, New York, N.Y.
196.	6/28/55	9/27/55	Ginga-Peachee	Hampton Pharmacy, Inc., Long Island City, N.Y.
197.	6/7/55	9/6/55	Celebrity	The Borden Company, New York, N.Y.
198.	5/31/55	8/23/55	Topper	Eskimo Pie Corp. Bloomfield, N.J.
199.	5/10/55	8/9/55	Duncan Hines & design	Hines-Park Foods, Inc., Ithaca, N.Y.
200.	5/10/55	3/13/56	Duncan Hines	Hines-Park Foods, Inc., Ithaca, N.Y.

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	Date of Publication for Opposition	Date of Publication as Registered	Mark	Name and Address of Owner
201.	4/26/55	7/19/55	Representation of calf holding a basket of milk bottles	Alderny Dairy Company, Newark, N.J.
202.	4/26/55	7/19/55	Glacier Club	The Borden Co., New York, N.Y.
203.	4/12/55	7/12/55	Creamsicle	Joe Lowe Corporation, New York, N.Y.
204.	4/12/55	7/12/55	Dreamsicle	Joe Lowe Corporation, New York, N.Y.
205.	4/12/55	7/12/55	Fudgsicle	Joe Lowe Corporation, New York, N.Y.
206.	4/12/55	7/12/55	Daitch Daypack w/ design	Daitch Crystal Dairies, Inc., Bronx, N.Y.
207.	3/29/55	6/28/55	Woody Woodlawn	Woodlawn Farm Dairy Company, Scranton, Pa..
208.	2/8/55	4/3/55	Super Twist	Lester T. Sawyer, d/b/a Hycrest Farms, Sterling, Mass.
209.	1/18/55	4/12/55	Screen-O	Joe Lowe Corporation, New York, N.Y.
210.	1/11/55	4/12/55	Betsy Ross	Betsy Ross Ice Cream Co., Inc., Phila., Pa.
211.	12/22/59	3/8/60	Representation of ice cream vending vehicle	Dairy Dan, Inc., Wilkes-Barre, Pa.
212.	8/8/61	10/24/61	Siesta	Foremost Dairies, Inc., New York, N.Y.
213.	2/24/59	5/12/59	Mini-Cal	Whitelawn Dairies, Inc., Brooklyn, N.Y.